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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1256

ALGOMA NET COMPANY,
Petitioner, and Respondent below,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent, and Petitioner below.

PETITION FOR WRIT OF CERTIORARI
To The United States Circuit Court
Of Appeals for the Seventh Circuit
And
BRIEF IN SUPPORT THEREOF

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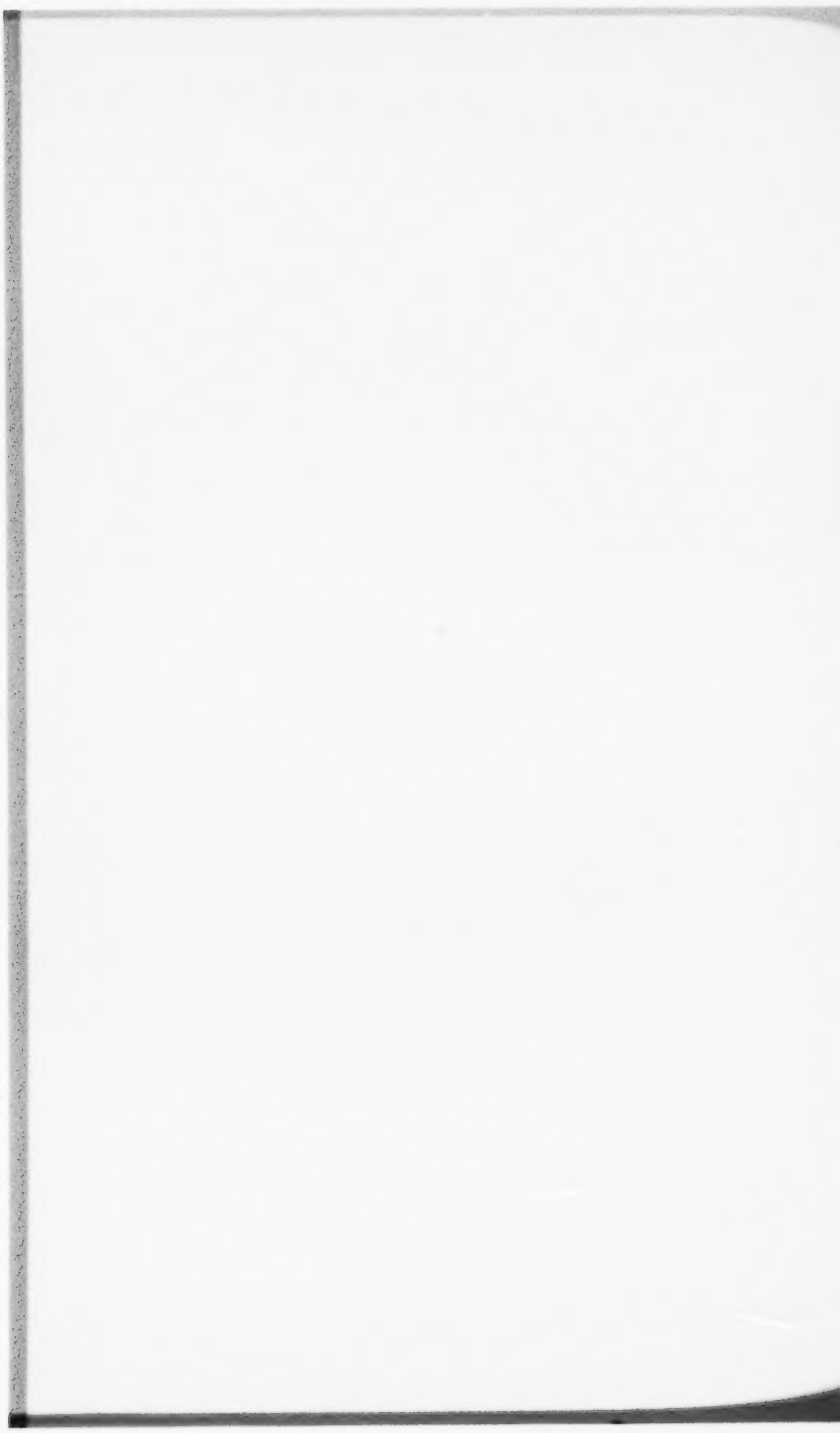

ERRATA.

Page 12, sixth line from bottom of page, "Kupples" should be spelled "Cupples".

Page 15, in paragraph 7(2), the blank citation should be 122 F. (2d) 809.

Page 21, lines 6 and 7, "Wisconsin" Act should be "National" Act.

Page 21, ninth line from bottom, "*Devega*" should be "*Davega*".

Page 22, line eight, "*Dagega*" should be "*Davega*".

Page 24, line nine, "so" should be stricken, and the word "on" inserted in lieu thereof.

INDEX.

Subject Index.

	PAGE
Petition for writ of certiorari	1
Summary statement of matter involved	2
Statement as to jurisdiction	7
Questions presented	9
Reasons relied on for allowance of writ	10
Prayer for writ	16
Brief in support of petition for writ of certiorari	17
Opinion of the court below	17
Jurisdiction	17
Statement of the case	18
Specifications of error	18
Argument	20
I. The writ should be allowed because the decision of the Circuit Court of Appeals, holding that the National Labor Relations Board had jurisdiction to reopen the case after the Wisconsin Labor Relations Board concluded its administration and disposed thereof, involves an important question of Federal law which has not been, but should be, settled by this court	20
II. The writ should be allowed because of the serious conflict in decisions, not only with the decisions of this court, but also with those of the various Circuit Courts of Appeals, in the holding of the Circuit Court of Appeals for the Seventh Circuit that this employer's public expression of his views on labor relations in general condemnation of union racketeering and interference, without specific reference to any one union or racketeer, is an unfair labor practice under Section 8 (1) of the National Labor Relations Act, and constitutes substantial evidence to support a finding of an unfair labor practice under Section 8 (3) of the Act	25

III. The writ should be allowed because of the conflict in decision arising through the holding of the Circuit Court of Appeals here that this employer if charged with the expressions of opinion on labor relations made by a minor supervisory employee, with power only to recommend hiring and firing, and with no authority from the employer or knowledge by the employer in regard to the making of such statements.. 26

IV. The writ should be allowed because of the conflict in decisions created through the holding of the Circuit Court of Appeals here that, where the Board finds both a legitimate and an illegitimate motivation for the acts complained of, it may guess that the illegitimate motive was the operative cause and conclude thereon that an unfair labor practice had been committed 27

V. The writ should be granted because of the conflict in decisions created by the holding of the Circuit Court of Appeals here that the Board may validly order the employer to cease and desist from violations of all of the provisions of the National Labor Relations Act, and in particular Section 7 thereof, upon a proper showing of violations of Sections 8 (1) and 8 (3) of that Act 27

VI. The writ should be granted because of conflict in decisions created by the holding of the Circuit Court of Appeals here that the Board may validly order the reinstatement, with back wages, of employees guilty of violations of the important rules of the company and of the criminal statutes of the State of Wisconsin..... 28

VII. The writ should be allowed because of the conflict in decisions created by the holding of the Circuit Court of Appeals here that the Board may validly order payment of back wages even though guilty of laches in bringing the case to the point of enforcement 28

VIII. The writ should issue because of conflict in decisions created by the holding of this Circuit Court of Appeals that the Board may validly order the employer to post notices, stating that the employer will not engage in the unfair labor practices from which it is ordered to cease and desist... 30

Conclusion 30

Appendix "A"..... 31

Appendix "B"..... 38

Appendix "C"..... 40

Appendix "D"..... 46

Appendix "E"..... 51

TABLE OF CASES CITED.

Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 62 S. Ct. 820 (1942).....8, 22

A. S. Abell & Company v. National Labor Relations Board, 97 F. (2d) 951 (C. C. A. 4th, 1938)..... 15

Ashville Hosiery Company v. National Labor Relations Board, 108 F. (2d) 288 (C. C. A. 4th, 1939)..... 12

Ballston-Stillwater Knitting Company, Inc. v. National Labor Relations Board, 98 F. (2d) 758 (C. C. A. 2d, 1938) 12

Bussmann Mfg. Co. v. National Labor Relations Board, 111 F. (2d) 783 (C. C. A. 8th, 1940)..... 13

Carey v. South Dakota, 250 U. S. 118 (1918)..... 24

Cupples Company Manufacturers v. National Labor Relations Board, 106 F. (2d) 100 (C. C. A. 8th, 1939) 12

Davego City Radio Inc. v. State Labor Relations Board, 281 N. Y. 13 (1939).....21, 22, 23

Federal Trade Commission v. Gratz, 253 U. S. 421 (1920) 28

John Fedor, et al. v. The Enamel Products Company, (Ohio, 1940) 2 C. C. H. Labor Cases, Section 18,749.23, 24

Foote Brothers Gear & Machine Corp. v. National Labor Relations Board, 114 F. (2d) 611 (C. C. A. 7th, 1941) 11, 26

Globe Cotton Mills v. National Labor Relations Board, 103 F. (2d) 91 (C. C. A. 5th, 1939)..... 13

Martel Mills Corp. v. National Labor Relations Board, 114 F. (2d) 624 (C. C. A. 4th, 1940).....14, 29

Midland Steel Products Company v. National Labor Relations Board, 113 F. (2d) 800 (C. C. A. 6th, 1940) 12

Mintz v. Baldwin, 289 U. S. 346 (1933)..... 21

National Labor Relations Board v. Carlisle Lumber Company, 99 F. (2d) 533 (C. C. A. 9th, 1938)..... 13

National Labor Relations Board v. Continental Oil Company, 121 F. (2d) 120 (C. C. A. 10th, 1941)..... 14

National Labor Relations Board v. Empire Furniture Corp., 107 F. (2d) 92 (C. C. A. 6th, 1939).....15, 29

National Labor Relations Board v. Express Publishing Company, 312 U. S. 426 (1941).....8, 13, 28

National Labor Relations Board v. Falk Corporation, 102 F. (2d) 383 (C. C. A. 7th, 1939)..... 12

National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240 (1939).....8, 14, 28

National Labor Relations Board v. Ford Motor Company, 114 F. (2d) 905 (C. C. A. 6th, 1940)..... 11

National Labor Relations Board v. Indiana and Michigan Electric Company, 124 F. (2d) 50 (C. C. A. 6th, 1941) 14

National Labor Relations Board v. Louisville Refining Company, 102 F. (2d) 689 (C. C. A. 6th, 1939)..... 16

National Labor Relations Board v. Mathieson Alkali Works, 114 F. (2d) 796 (C. C. A. 4th, 1940)..... 13

National Labor Relations Board v. Mall Tool Company, 119 F. (2d) 700 (C. C. A. 7th, 1941)..... 15

National Labor Relations Board v. Sands Mfg. Co., 306 U. S. 332 (1939).....8, 11, 12, 26

National Labor Relations Board v. Sparks Withington Company, 119 F. (2d) 78 (C. C. A. 6th, 1941)..... 12

National Labor Relations Board v. Walter Stover, 114 F. (2d) 513 (C. C. A. 10th, 1940).....11, 26

National Labor Relations Board v. Tex-O-Kan Flour Mills Company, 122 F. (2d) 433 (C. C. A. 5th, 1941) 12, 15

National Labor Relations Board v. Union Pacific Stages, 99 F. (2d) 153 (C. C. A. 9th, 1938).....11, 15

National Labor Relations Board v. Virginia Electric & Power, 86 L. Ed. (Adv. Op.) 306, 1941.....8, 11, 25

National Labor Relations Board v. West Texas Utilities Company, 119 F. (2d) 683 (C. C. A. 5th, 1941).13, 14

National Labor Relations Board v. Wilson Line Inc., (C. C. A. 3d, 1941) 4 C. C. H. Labor Cases No. 60,689 15

New York, N. H. & H. R. R. Company v. I. C. C., 200 U. S. 361 (1906)..... 28

Northwestern Bell Telephone Company v. Nebraska State Ry. Comm., 297 U. S. 471 (1936).....22, 23, 24

Peninsular & Occidental S. S. Company v. National Labor Relations Board, 98 F. (2d) 411 (C. C. A. 5th, 1938) 14

Quaker State Refining Corp. v. National Labor Relations Board, 119 F. (2d) 631 (C. C. A. 3d, 1941).... 12

Republic Steel Corp. v. National Labor Relations Board, 107 F. (2d) 472 (C. C. A. 3d, 1939).....14, 29

Senn v. Tile Layers' Protective Union, 301 U. S. 468, 1937 21

Southern S. S. Company v. National Labor Relations Board, 62 S. Ct. 886 (1942).....8, 14, 28

Standard Lime & Stone Company v. National Labor Relations Board, 97 F. (2d) 531 (C. C. A. 4th, 1938) 14

Swift & Company v. United States, 196 U. S. 375 (1905) 28

Whitfield v. Ohio, 297 U. S. 431 (1936)..... 24

Wisconsin Labor Relations Board v. Fred Rueping Leather Company, 228 Wis. 473 (1938)..11, 13, 21, 22, 27

STATUTES CITED.

49 Stat. 449, U. S. C., Supp. V. Title 29, Section 151, et seq..... 2
49 Stat. 1921, Ch. 804, U. S. C., Title 29, Section 160 (e) 7, 8, 17
43 Stat. 938, Ch. 229, U. S. C., Title 28, Section 347(a) 7, 8, 18
Rules of This Court, Rule 38, para. 1..... 10
Wis. Stats., 1937, Ch. 111.....11, 13, 21
Wis. Stats., 1939, 111.....11, 13
Wis. Stats., 1937, Sections 340.41, 340.57, 343.11, 343.12, 353.05, 353.31..... 38

TREATISES CITED.

2 Labor Disputes and Collective Bargaining, Teller (1940), Section 270.....22, 23
11 Am. Jur., Commerce, Section 26..... 24

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No. .....

ALGOMA NET COMPANY,
Petitioner, and Respondent below,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent, and Petitioner below.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

The above named petitioner respectfully petitions for a Writ of Certiorari to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit, 124 F. (2d) 730 (C. C. A. 7th, 1941), rendered December 9, 1941, confirming and enforcing an Order made by the National Labor Relations Board on November 23, 1940. (The Decision is set forth in full at pp. 450-456, inclusive, of the Transcript of Record, and as Appendix (A) of this Petition, while the Order of the National Labor Relations Board is set forth in full at pp. 83-100, inclusive, of the Transcript of Record.)

Summary Statement of the Matter Involved.

This action arises upon petition by the National Labor Relations Board to the United States Circuit Court of Appeals for the Seventh Circuit, for the enforcement of an Order issued by the Board against the Algoma Net Company pursuant to Section 10(c) of the National Labor Relations Act (49 Stat. 449, U. S. C., Supp. V., Title 29, Section 151, *et seq.*) (R. 443-447).[1]

The Algoma Net Company is a Wisconsin corporation, with its principal office and place of business in Algoma, Wisconsin, engaged in the manufacture and sale of fly nets, hammocks, baby swings, and related products, employing approximately 150 persons.

The National Labor Relations Board is an administrative body created by the National Labor Relations Act (cited above).

On, or immediately before, February 6, 1939, petitioner laid off its employees Kaus, Trainor, and Ferron (R. 87, 157, 175, 194). The Board contends that these lay-offs were motivated by the union membership and activity of the employees involved, predicated upon testimony that: An A. F. L. organization meeting was held on February 4, 1939 (R. 86; 153-156); Fischer, a minor supervisory official, made anti-union statements (R. 86, 87, 149, 150, 169, 170, 175, 193, 194, 240-243, 250, 251); superintendent Anderegg expressed anti-union and anti-racketeering opinions (R. 87, 171, 214, 265, 266, 270); new employees were hired following the lay-offs (R. 141, 142, 264, 274); the lay-offs seemed to depart from the company's regular lay-off policy (R. 205, 206, 211, 239, 240, 264, 271-274). Petitioner contends that the lay-offs were not motivated by the union activities of these three employees, but were a business necessity, predicated upon testimony that: As conceded

1. All references to the Record (R.) refer to the printed Transcript of Record, filed herewith, in accordance with the rules of this Court.

by the Board (R. 89), surplus stock on hand and a dearth of orders and of raw materials, prior to February 4, necessitated a crew reduction (R. 146, 195, 284, 293, 294, 299, 308-323, 359-361, 376, 377, 388, 391-394, 412, 413, 424, 432); similar lay-offs at the plant and involving these same employees had occurred in past years (R. 174, 190, 192, 199, 200, 259, 260, 271, 289, 290, 302-304, 333-338, 360, 361, 380-382, 388, 389, 394, 395, 360, 361, 411); the lay-offs followed the regular company policy (R. 150, 157, 194, 203-205, 294, 295, 323-327, 386, 391, 392, 406, 411, 412); the lay-off orders were given the day before the meeting of February 4 (R. 308-323); Kaus and Ferron were actually laid off before the meeting of February 4, (R. 304-305); new employees hired were placed on jobs these men could not fill (R. 205, 264, 265, 286, 511); statements made by Fischer were made without authority or knowledge of petitioner, by a minor supervisory official (R. 168-170, 350, 351, 382-387); making of the bulk of alleged anti-union statements was denied (R. 87, 242, 243, 294, 295, 350-354, 377-387, 420, 421); anti-union statements made had no effect upon the employees (R. 158, 255, 256, 269, 297, 384, 385, 394, 404-417); union members in the plant were given preferential treatment (R. 156, 253-255, 297, 329-333, 338, 339, 379-381, 394, 408-417); petitioner lacked an anti-union animus or knowledge of union activities prior to these lay-offs (R. 133, 136, 329, 330, 342, 349, 350, 380, 381, 394, 416, 417).

On the night of February 7, 1939, Kaus, Trainor, and Ferron, one or more of them drunk, violating a series of company rules, stole the key to petitioner's plant, entered, solicited union memberships from employees on their jobs, severely beat up one Mr. Lumaye for refusal to join, used vile language in the attempt, damaged his clothing, damaged company property, and committed assault, battery, and other violations of the criminal statutes of the State of Wisconsin. (See Wisconsin Statutes violated in ap-

pendix (B) to this petition; R. 90, 100, 109-117, 125-128, 134-145, 159, 167-169, 184, 185, 206-208, 244, 354, 355, 390-399, 407, 408.) On February 8, Kaus was discharged (R. 91, 210, 217-218). On February 13, Kaus was reinstated at the request of the Wisconsin Labor Board (R. 91). On February 20, Kaus, Trainor, and Ferron were finally discharged (R. 92, 103-105, 212-214). The Board contends that these discharges were discriminations constituting unfair labor practices, predicated upon testimony that: Company rules were not previously enforced (R. 95); petitioner posted a notice that the employees could join the union or not, in their own free choice (R. 93, 94); petitioner addressed an open letter to the Wisconsin Labor Board, condemning outside labor leaders and racketeers (R. 92, 93). The company denies discrimination, and contends justification for the discharges predicated upon testimony that: The Wisconsin Labor Board and the A. F. L. originally agreed with petitioner's position (R. 137-141, 160, 375, 376); the Wisconsin Industrial Commission denied unemployment benefits to Kaus for these reasons (R. 292, 293, 435, 436); important company rules were violated, previous violations of which had never gone unpunished to petitioner's knowledge (R. 126, 148, 151, 152, 163, 209, 210, 241, 242, 250, 270, 328, 329, 342, 387, 418, 419).

On February 21, 1939, pursuant to its open letter to the Wisconsin Labor Board, petitioner shut down its plant A operations, involving 34 employees. On February 27, the plant was reopened following conferences with the Wisconsin Labor Board. Upon the background of testimony stated above, the Board contends such shut down constituted discrimination. Petitioner contends that the shut down was necessitated to protect property and insurance rates against threatened confiscation (R. 96, 227-230), and was reopened upon an assurance of protection by the Wisconsin Labor Board (R. 345, 346).

On March 18, 1939, petitioner offered to reinstate these three (R. 270). They failed to accept the offer (R. 164, 165). Again petitioner offered reinstatement (R. 235). Again the offer was refused (R. 95, 130, 131). From the date of discharge to the dates of these offers, none of the three requested reinstatement (R. 120).

During all of this time, the Wisconsin Labor Relations Board attempted an adjustment of the dispute, finally effecting a settlement. On February 8, 1939, Rauch, a representative of the Wisconsin Board, and Heymanns, an A. F. L. representative, conferred with petitioner relative to unfair labor practice charges filed with the Wisconsin Board on that date (R. 91, 137-140). Partial adjustments were reached on February 9, 1939, involving a reinstatement of the three and the posting of a Wisconsin Board notice to employees (R. 91, 140, 141, 160, 198, 269, 342, 344, 394-396). On February 20th, petitioner wrote the Wisconsin Board, upsetting the tentative settlement, and requested the Board to reenter the case (R. 92, 93, 106, 107, 114, 115, 267). On February 25, 1939, Handrich, the Wisconsin Board representative, conferred in Algoma with petitioner (R. 94, 120, 124). Following a full discussion of the facts of the case, not heretofore presented to the Wisconsin Board, Handrich approved the actions of the company, refused to request reinstatement of the three employees, and advised petitioner to proceed with its business upon the informal dismissal of charges stated there (R. 146, 147, 285-288, 345, 346, 368, 369). Pursuant to this understanding with the Wisconsin Board, petitioner reopened its plant A on the next working day (R. 94). The National Labor Relations Board was not called into the matter by the union until March 7th, after the Wisconsin Board had concluded its administration over these matters and granted a dismissal (R. 91, 157).

Pursuant to charges filed by the A. F. L. (R. 1-3), the National Labor Relations Board issued its complaint and

notice of hearing on May 26, 1939 (R. 3-8), alleging violations of Sections 8(1), (3) and 2(6), (7) of the National Labor Relations Act. The answer, as amended (R. 9-14), denied the allegations, and pleaded lack of jurisdiction. Hearing was conducted from June 5 to June 9, 1939, inclusive, at Algoma, Wisconsin.

On February 8, 1940, the trial examiner filed his intermediate report, in substantially the same terms as the Board's ultimate Order, except that the examiner did not recommend making whole the employees laid off in plant A (R. 42-43). On March 13, 1940, petitioner filed exceptions to the intermediate report (R. 44-75).

On November 23, 1940, the Board issued the Findings of Fact, Conclusions of Law, and Order (R. 83-100), finding petitioner guilty as charged, and ordering it to cease and desist from the unfair practices so found, to reinstate these three employees with back pay, to make whole the 34 employees laid off in plant A, to post notices that petitioner would cease and desist from the unfair practices so found, and to take the usual affirmative steps related thereto.

On May 31, 1940, the Board petitioned the United States Circuit Court of Appeals for the Seventh Circuit for an Order of Enforcement (R. 442-447). On October 31, 1941, the company answered such petition, alleging lack of jurisdiction in the National Board because of the Wisconsin Labor Board proceedings, lack of substantial evidence to support the Board's Findings, Conclusions, and Order, and invalidity of that Order (R. 448). The matter was argued before the Circuit Court of Appeals on November 14, 1941 (R. 449).

On December 9, 1941, the Circuit Court of Appeals rendered its Decision, granting the Board's request for enforcement, and finding that the National Labor Relations Board had jurisdiction to act despite the disposition of the matter by the Wisconsin Labor Board, finding substantial

evidence to support the Board's Order, based principally upon the anti-union statements of the company and minor supervisory officials, but otherwise admitting legitimate grounds for the lay-offs and discharges, and finding the Order of the Board to be valid (R. 450-456). On January 3, 1942, the Court filed its decree, enforcing the Order of the Board in the same terms as the original Board Order (R. 462-464).

Statement as to Jurisdiction.

The Supreme Court of the United States has jurisdiction to review the Decision and Decree of the United States Circuit Court of Appeals for the Seventh Circuit under the provisions of the Act of Congress of June 25, 1936, Chapter 804, 49 Stat. 1921, U. S. C., Title 29, Section 160(e), being that provision of the National Labor Relations Act specifically providing for review of the Decree of the Circuit Court of Appeals upon Writ of Certiorari as provided in Section 347 of Title 28, and, hence, under the provisions of Section 240 of the Judicial Code, as amended by the Act of Congress of February 13, 1925, Chapter 229, 43 Stat. 938, U. S. C. Title 28, Section 347(a), conferring jurisdiction upon the Supreme Court of the United States to require by certiorari that the Decree of the Circuit Court of Appeals be brought up.

The United States Circuit Court of Appeals rendered its Decision on December 9, 1941, and filed the Decree (R. 462) on January 3, 1942. The Opinion of the Court is officially reported in 124 F. (2d) 730 (C. C. A. 7th, 1941), and, as aforementioned, is attached at the end of this Petition and Brief as Appendix (A).

In successive orders of December 31, 1941 (R. 461), January 28, 1942 (R. 467), February 26, 1942 (R. 470), and April 4, 1942 (Appendix (C), attached at the end of this Petition and Brief), and May 2, 1942 (attached as Appendix (D) at the end of this Petition and Brief),

the United States Circuit Court of Appeals for the Seventh Circuit stayed the execution and enforcement of its Decree to and including June 3, 1942.

In successive and appropriate orders of March 30, 1942 (R. 471), May 2, 1942 (R. 471), and May 9, 1942 (R. 472), Mr. Justice Byrnes extended the time for filing this Petition to and including May 25, 1942.

The case being one of petition by the National Labor Relations Board for enforcement of its own Order (R. 443), and the Court having granted the Petition for Enforcement (R. 456), and issued its Decree so ordering (R. 462-464), this petition brings the matter within the review provisions of U. S. C. Title 29, Section 160(e), set forth above, granting special jurisdiction in this type of case, and within the provisions of U. S. C. Title 28, Section 347(a), set forth above, granting general jurisdiction to this Court upon Petition for Writ of Certiorari.

Some of the cases which petitioner believes substantiate the jurisdiction of the Court are as follows:

Allen-Bradley Local 1111, etc. v. *Wisconsin Employment Relations Board,* 62 S. Ct. 820 (1942).

National Labor Relations Board v. *Virginia Electric & Power Co.,* 86 L. Ed. (Adv. Op.) 306 (1941).

National Labor Relations Board v. *Fansteel Metallurgical Corp.,* 306 U. S. 240 (1939).

National Labor Relations Board v. *Sands Mfg. Co.,* 306 U. S. 332 (1939).

Southern S. S. Co. v. *National Labor Relations Board,* 62 S. Ct. (Adv. Op.) 886 (1942).

National Labor Relations Board v. *Express Publishing Co.,* 312 U. S. 426 (1941).

A copy of the entire record in this case, as certified to be true and correct by the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, is hereby

furnished as a Transcript of Record, and made a part of this application, in compliance with Rule 38, paragraph 1, of the rules of this Court.

The Questions Presented.

This case presented the following questions to the National Labor Relations Board and to the United States Circuit Court of Appeals:

1. Whether the National Labor Relations Board possesses jurisdiction to hear this case and issue an order therein, where the Wisconsin Labor Relations Board first assumed jurisdiction and dismissed the case before the National Labor Relations Board took cognizance of or attempted to assume jurisdiction.
2. Whether the National Labor Relations Board's Findings of Fact, Conclusions of Law, and Order are supported by substantial evidence.
3. Whether Section 8(1) of the National Labor Relations Act may be construed, consistently with the first Amendment to the Constitution of the United States, to embrace as an unfair labor practice an employer's public expression of his views on labor relations in general condemnation of union racketeering and interference without specific reference to any one union or racketeer.
4. Whether, if the last question be answered in the affirmative, such public expression of opinion here did constitute an unfair labor practice within Section 8(1).
5. Whether an employer may be held responsible for the expression of opinion on labor relations of a minor supervisory employee, with power only to recommend hiring and firing, and with no authority from the employer or knowledge by the employer in regard to the making of such statements.
6. Whether, where the Findings indicate both a legitimate and an illegitimate motivation for the acts complained of, the Board and the Court may properly segregate by conjecture the illegitimate motive, and conclude thereon that an unfair labor practice had been committed.

7. Whether, upon Findings that the employer has violated Sections 8(1), (3) of the Act, the Board may validly order such employer to cease and desist from violation of any and all provisions and sections of the Act.

8. Whether the Board may validly order the reinstatement with back wages of employees guilty of violation of the important rules of the company and of the criminal statutes of the State of Wisconsin.

9. Whether the Board may validly order the payment of back wages to employees discriminatorily discharged, laid off, or locked out, where the Board unreasonably permits such contingent liability to accumulate over an undue length of time before rendering its Order or seeking enforcement thereof.

10. Whether the Board may validly order the employer to post notices stating that the employer will not engage in the unfair practices from which it is ordered to cease and desist, thereby admitting liability and guilt.

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals, holding that the National Labor Relations Board had jurisdiction to reopen the case after the Wisconsin Labor Relations Board concluded its administration and disposed thereof, involves an important question of Federal law which has not been, but should be, settled by this Court.

2. The decision of the Circuit Court of Appeals, holding that this employer's public expression of his views on labor relations in general condemnation of union racketeering and interference, without specific reference to any one union or racketeer, is an unfair labor practice under Section 8(1) of the National Labor Relations Act, and constitutes substantial evidence to support a finding of an unfair labor practice under Section 8(3) of the Act in regard to the discharge, lock-out, and lay-off of employees, (a) is a decision of a Federal question that in a way probably

is in conflict with the decisions of this Court in *National Labor Relations Board* v. *Virginia Electric & Power Company,* 86 L. Ed. (Adv. Op.) 306 (1941), and *National Labor Relations Board* v. *Sands Mfg. Co.,* 306 U. S. 332 (1939), (b) is in conflict with decisions of various Circuit Courts of Appeals, on the same matter, as follows:

(1) With its own decision in the case of *Foote Bros. Gear and Machine Corp.* v. *National Labor Relations Board,* 114 Fed. (2d) 611 (C. C. A. 7th, 1941); rev'd., on another ground, 311 U. S. 620 (1941).

(2) With the decision of the Circuit Court of Appeals for the Sixth Circuit, in the case of *National Labor Relations Board* v. *Ford Motor Co.,* 114 Fed. (2d) 905 (C. C. A. 6th, 1940); cert. den. 312 U. S. 689 (1941).

(3) With the decision of the Circuit Court of Appeals for the Ninth Circuit, in the case of *National Labor Relations Board* v. *Union Pacific Stages,* 99 Fed. (2d) 153 (C. C. A. 9th, 1938).

(4) With the decision of the Circuit Court of Appeals for the Tenth Circuit, in the case of *National Labor Relations Board* v. *Walter Stover,* 114 F. (2d) 513 (C. C. A. 10th, 1940),

and, (c) is in conflict with the decision of the Wisconsin Supreme Court, in the case of *Wisconsin Labor Relations Board* v. *Fred Rueping Leather Company,* 228 Wis. 473 (1938), on the same matter, under identical legislation contained in the first Wisconsin Labor Relations Act, Chapter 111, Wisconsin Stats., 1937, and the present Wisconsin Employment Peace Act, Chapter 111, Wisconsin Stats., 1939, thus presenting serious conflict in interpretation between the State and Federal Statutes, the uniform administration of which is essential in this vastly important field.

3. The decision of the Circuit Court of Appeals, holding that this employer is charged with the expressions of opinion on labor relations made by a minor supervisory employee, with power only to recommend hiring and firing, and with no authority from the employer or knowledge by the employer in regard to the making of such statements,

(a) is a decision of a Federal question in a way probably in conflict with the decision of this Court in *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332 (1939), and (b) is in conflict with decisions of various Circuit Courts of Appeal on the same matter, as follows:

(1) With its own decision in the case of *National Labor Relations Board* v. *Falk Corporation*, 102 F. (2d) 383 (C. C. A. 7th, 1939), rev'd. on other grounds 308 U. S. 453 (1940).

(2) With the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Ballston-Stillwater Knitting Co., Inc.* v. *National Labor Relations Board*, 98 Fed. (2d) 758 (C. C. A. 2nd, 1938).

(3) With the decision of the Circuit Court of Appeals for the Third Circuit, in the case of *Quaker State Refining Corp.* v. *National Labor Relations Board*, 119 F. (2d) 631 (C. C. A. 3rd, 1941).

(4) With the decision of the Circuit Court of Appeals for the Fourth Circuit, in the cases of *Ashville Hosiery Co.* v. *National Labor Relations Board*, 108 F. (2d) 288 (C. C. A. 4th, 1939); and *National Labor Relations Board* v. *Mathieson Alkali Works*, 114 F. (2d) 796 (C. C. A. 4th, 1940).

(5) With the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *National Labor Relations* v. *Tex-O-Kan Flour Mills Co.*, 122 F. (2d) 433 (C. C. A. 5th, 1941).

(6) With the decision of the Circuit Court of Appeals for the Sixth Circuit, in the cases of *National Labor Relations Board* v. *Sparks-Withington Company*, 119 F. (2d) 78 (C. C. A. 6th, 1941), and *Midland Steel Products Company* v. *National Labor Relations Board*, 113 F. (2d) 800 (C. C. A. 6th, 1940).

(7) With the decision of the Circuit Court of Appeals for the Eighth Circuit, in the case of *Kupples Company Manufacturers* v. *National Labor Relations Board*, 106 F. (2d) 100 (C. C. A. 8th, 1939).

4. The Decision of the Circuit Court of Appeals, holding that, where the Board finds both a legitimate and illegitimate motivation for the acts complained of, it may

guess that the illegitimate motive was the operative cause, and conclude thereon that an unfair labor practice had been committed, (a) is in conflict with the decisions of the Circuit Court of Appeals for Eighth Circuit, in the case of *Bussmann Manufacturing Company* v. *National Labor Relations Board,* 111 F. (2d) 783 (C. C. A. 8th, 1940), and (b), is in conflict with the decision of the Wisconsin Supreme Court in the case of *Wisconsin Labor Relations Board* v. *Fred Rueping Leather Company,* 228 Wis. 473 (1938), on the same matter, under identical legislation contained in the first Wisconsin Labor Relations Act, Chapter 111, Wisconsin Stats., 1937, and the present Wisconsin Employment Peace Act, Chapter 111, Wisconsin Stats., 1939, thus presenting serious conflict in interpretation between Federal and State Statutes, the uniform administration of which is essential in this vastly important field.

5. The decision of the Circuit Court of Appeals, holding that the Board may validly order the employer to cease and desist from violations of all of the provisions of the National Labor Relations Act, upon a mere showing of violations of Sections 8(1) and 8(3) of that Act, (a) is a decision of a Federal question in a way probably conflicting with the decision of this Court in *National Labor Relations Board* v. *Express Publishing Company,* 312 U. S. 426 (1941), and (b) is in conflict with the decisions of the various Circuit Courts of Appeals, on the same matter, as follows:

(1) With the decision of the Circuit Court of Appeals for the Fifth Circuit, in the cases of *Globe Cotton Mills* v. *National Labor Relations Board,* 103 F. (2d) 91 (C. C. A. 5th, 1939), and *National Labor Relations Board* v. *West Texas Utilities Company,* 119 F. (2d) 683 (C. C. A. 5th, 1941).

(2) With the decision of the Circuit Court of Appeals for the Ninth Circuit, in the case of *National Labor Relations Board* v. *Carlisle Lumber Company,* 99 F. (2d) 533 (C. C. A. 9th, 1938); cert. den. 306 U. S. 646 (1939).

(3) With the decision of the Circuit Court of Appeals for the Tenth Circuit, in the case of *National Labor Relations Board* v. *Continental Oil Company*, 121 F. (2d) 120 (C. C. A. 10th, 1941).

6. The decision of the Circuit Court of Appeals, holding that the Board may validly order the reinstatement, with back wages, of employees guilty of violations of the important rules of the company and of the criminal statutes of the State of Wisconsin, (a) is a decision of a Federal question in a way probably in conflict with the decisions of this Court in *National Labor Relations Board* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240 (1939), and *Southern S. S. Co.* v. *National Labor Relations Board*, 62 S. Ct. 886 (1942), and (b) is in conflict with the decisions of the various Circuit Courts of Appeals, on the same matter, as follows:

(1) With the decision of the Circuit Court of Appeals for the Third Circuit, in the case of *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472 (C. C. A. 3rd, 1939).

(2) With the decision of the Circuit Court of Appeals for the Fourth Circuit, in the cases of *Martel Mills Corp.* v. *National Labor Relations Board*, 114 F. (2) 624 (C. C. A. 4th, 1940), and *Standard Lime and Stone Company* v. *National Labor Relations Board*, 97 F. (2d) 531 (C. C. A. 4th, 1938).

(3) With the decisions of the Circuit Court of Appeals for the Fifth Circuit, in the cases of *Peninsular and Occidental S. S. Co.* v. *National Labor Relations Board*, 98 F. (2d) 411 (C. C. A. 5th, 1938); cert. den. 305 U. S. 653 (1939), and *National Labor Relations Board* v. *West Texas Utilities Company*, 119 F. (2d) 683 (C. C. A. 5th, 1941).

(4) With the decisions of the Circuit Court of Appeals for the Sixth Circuit, in the cases of *National Labor Relations Board* v. *Indiana and Michigan Electric Company*, 124 F. (2d) 50 (C. C. A. 6th, 1941); cert. applied for 4-11-42, docket 1137; and *National*

Labor Relations Board v. *Empire Furniture Corp.*, 107 F. (2d) 92 (C. C. A. 6th, 1939).

(5) With the decision of the Circuit Court of Appeals for the Ninth Circuit, in the case of *National Labor Relations Board* v. *Union Pacific Stages*, 99 F. (2d) 153 (C. C. A. 9th, 1938).

7. The decision of the Circuit Court of Appeals, holding that the Board may validly order the payment of back wages to employees discriminatorily discharged, laid-off, or locked-out, where the Board unreasonably and inequitably permits such contingent liability to accumulate over an undue length of time before rendering its order or seeking enforcement thereof, is a decision in conflict with the decisions of various Circuit Courts of Appeals, on the same matter, as follows:

(1) With its own decision in the case of *National Labor Relations Board* v. *Mall Tool Company*, 119 F. (2d) 700 (C. C. A. 7th, 1941).

(2) With the decision of the Circuit Court of Appeals for the Third Circuit, in the case of *National Labor Relations Board* v. *Wilson Line, Inc.*, (C. C. A. 3rd, 1941), ____ F. (2d) ____, 4 C. C. H. Labor Cases No. 60,689.

(3) With the decision of the Circuit Court of Appeals for the Fifth Circuit, in the case of *Tex-O-Kan Flour Mills Company* v. *National Labor Relations Board*, 122 F. (2d) 433 (C. C. A. 5th, 1941).

8. The decision of the Circuit Court of Appeals, holding that the Board may validly order the employer to post notices, stating that the employer will not engage in the unfair practices from which it is ordered to cease and desist, thereby requiring an admission of liability and guilt, is in conflict with the decisions of the various Circuit Courts of Appeals, on the same matter, as follows:

(1) With the decision of the Circuit Court of Appeals for the Fourth Circuit, in the case of *A. S. Abell & Company* v. *National Labor Relations Board*, 97 F. (2d) 951 (C. C. A. 4th, 1938).

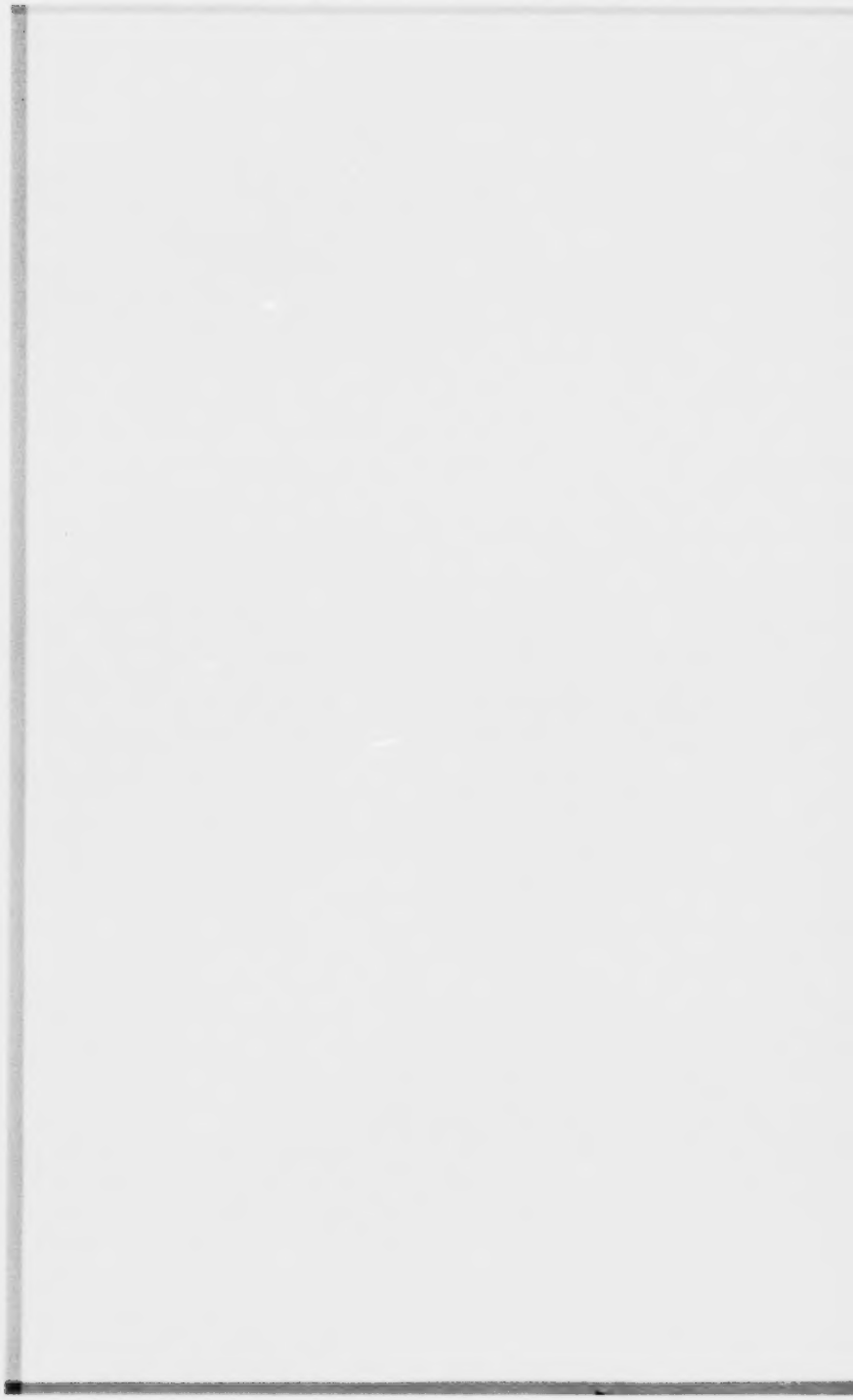
(2) With the decision of the Circuit Court of Appeals for the Sixth Circuit, in the case of *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 689 (C. C. A. 6th, 1939); cert. den. 308 U. S. 569 (1939).

Prayer for Writ.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court for review of determination a full and complete Transcript of Record, and all of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 7689, *National Labor Relations Board, Petitioner,* v. *Algoma Net Company, Respondent,* to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment therein of said Circuit Court of Appeals be reversed by the Court, and that your petitioner may have such other and further relief as this Honorable Court may deem just and proper.

Dated May 21, 1942.

ROBERT C. BASSETT,
Counsel for Petitioner.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

ALGOMA NET COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 124 F. (2d) 730, and is appended hereto as Exhibit (A), and likewise set forth in full at pp. 450-456, inclusive, in the Transcript of Record.

Jurisdiction.

The Supreme Court of the United States has jurisdiction to review the Decision and Decree of the United States Circuit Court of Appeals for the Seventh Circuit under the provisions of the Act of Congress of June 25, 1936, Chapter 804, 49 Stat. 1921, U. S. C., Title 29, Section 160(e), being that provisions of the National Labor

Relations Act specifically providing for review of the Decree of the Circuit Court of Appeals upon Writ of Certiorari as provided in Section 347 of Title 28, and, hence, under the provisions of Section 240 of the Judicial Code, as amended by the Act of Congress of February 13, 1925, Chapter 229, 43 Stat. 938, U. S. C. Title 28, Section 347(a), conferring jurisdiction upon the Supreme Court of the United States to require by certiorari that the Decree of the Circuit Court of Appeals be brought up.

The date of the Decision, Orders Staying Execution and extending time for filing this petition, and some of the cases which petitioner believes substantiate the jurisdiction of this Court are found in the jurisdictional statement in the foregoing petition, and, for the sake of brevity, that jurisdictional statement is referred to and incorporated herein as though made a part of this brief.

Statement of the Case.

A summary statement of the case appears in the foregoing Petition for Writ of Certiorari, which, in the interest of brevity, is incorporated herein by reference.

Specification of Errors.

The United States Circuit Court of Appeals for the Seventh Circuit erred in the following respects:

1. In holding that the National Labor Relations Board possessed jurisdiction to hear this case and issue an Order therein, where the Wisconsin Labor Relations Board first assumed jurisdiction and dismissed the case before the National Labor Relations Board took cognizance of or attempted to assume jurisdiction.
2. In holding that the Findings of Fact, Conclusions of Law, and Order of the National Labor Relations Board were supported by substantial evidence.
3. In holding that an employer's public expression of his views on labor relations in general condemna-

tion of union racketeering and interference without specific reference to any one union or racketeer, constituted an unfair labor practice within Section 8(1) of the National Labor Relations Act.

4. In holding that this petitioner was responsible for the expressions of opinion on labor relations of a minor supervisory employee, with power only to recommend hiring and firing, and with no authority from the employer or knowledge by the employer in regard to the making of such statement.

5. In holding that, although the employer demonstrated legitimate reasons and motives for the acts complained of in this matter, the Board segregated a co-extensive illegitimate motive and concluded thereon, by conjecture, that the illegitimate motive was the sole motive, and that, hence, an unfair labor practice had been committed.

6. In sustaining those portions of the Board's order requiring the employer to cease and desist from violations of any and all provisions and sections of the Act, even though the Board limited its Findings to violations of Sections 8(1) and (3) of the Act.

7. In sustaining that portion of the Board's Order requiring the reinstatement with back wages of employees guilty of violation of important rules of the company, and of the criminal statutes of the State of Wisconsin.

8. In sustaining that portion of the Board's Order requiring the payment of back wages to the employees affected, after the Board had unreasonably permitted such contingent liability to accumulate over an undue length of time before rendering its Order or seeking enforcement of its provisions.

9. In sustaining that portion of the Board's order requiring the employer to post notices stating that the employer will not engage in the unfair practices from which it is ordered to cease and desist, thereby admitting liability and guilt.

ARGUMENT.

Preliminary Statement.

Although petitioner submits that this case presents many cogent reasons for the granting of the Writ, none seem as patent or urgent to petitioner as the necessity of resolving the conflict or jurisdiction between the National and the Wisconsin Labor Relations Boards, as presented here, and of revising this decision so as to bring the formal requirement of the Board's Order into harmony with the current state of the law.

In the interest of brevity, cases cited in that section of the petition entitled "Reasons Relied on for the Allowance of the Writ" are not repeated here in the brief unless made the subject of special comment.

I. The Writ Should Be Allowed Because the Decision of the Circuit Court of Appeals, Holding That the National Labor Relations Board Had Jurisdiction to Reopen the Case After the Wisconsin Labor Relations Board Concluded Its Administration and Disposed Thereof, Involved an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

Existing precedents in the field of a conflict in the jurisdiction of the National and Wisconsin Labor Relations Boards carries up to but not into the precise question presented by this case.

The Wisconsin Board and the National Board have concurrent jurisdiction over interstate commerce labor disputes in Wisconsin. The legislative acts from which these Boards derive their authority are almost identical in terms and policy; no conflict exists material to this case. The

alleged unfair labor practice complained of here under Section 8(1) and 8(3) of the National Act are condemned in identical language in Sections 111.08(1) and (3) of the Wisconsin Statutes for 1937, applicable at the time of the occurrences complained of. (See Appendix (E) of this Brief.) The policy and other provisions of the Wisconsin Act and of Chapter 111 of the Wisconsin Statutes for 1937 are almost identical. The only possible conflict here between Governments is a conflict between administrative agencies, not between statutes, which, if the latter were the case, might oust the state jurisdiction.

The jurisdiction of these two Boards is concurrent here because Congress intended that it be so. *Wisconsin Labor Relations Board* v. *Fred Rueping Leather Company,* 228 Wis. 473 (1938); *Senn* v. *Tile Layers' Protective Union Local No. 5,* 301 U. S. 468 (1937). The National Labor Relations Act does not *ipso facto* preclude application of the state law as to the same situations. For Congress to curtail the state police power and exclude the jurisdiction of the state, the congressional intent must be clear and will not be lightly inferred; since the acts are consistent, that of Congress does not supersede or exclude that of the state legislature. *Mintz* v. *Baldwin,* 289 U. S. 346 (1933). Section 10(a) of the National Labor Relations Act establishes the exclusive character of the National Board's administrative power only as applied to other administrative agencies, and does not apply to a state law passed subsequent to the enactment of the National Act. *Devega City Radio, Inc.* v. *State Labor Relations Board,* 281 N. Y. 13 (1939); *Wisconsin Labor Relations Board* v. *Fred Rueping Leather Company,* 228 Wis. 473 (1938). Upon these considerations it has been held that the National Labor Relations Act does not so clearly manifest an intention to exclude state regulations as to supersede, in so far as labor practices affecting interstate commerce are concerned, state legislation covering the same ground, and particu-

larly has not superseded the Wisconsin Labor Relations Act of 1937. *Wisconsin Labor Relations Board* v. *Fred Rueping Leather Company,* 228 Wis. 473 (1938). Nor has it superseded the present Wisconsin Employment Peace Act. *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board,* 62 S. Ct. 820 (1942). Nor has it superseded the New York Labor Relations Act, similar to the National Act and the first Wisconsin Act. *Dagega City Radio, Inc.* v. *State Labor Relations Board,* 281 N. Y. 13 (1939).

Where concurrent jurisdiction exists, as here, the Wisconsin Board may act until the National Board assumes jurisdiction. 2 *Labor Disputes and Collective Bargaining,* Teller (1940) Section 270. Casting a doubt as to whether the State law might not continue in operation, even after the National Act becomes operative, it has been held that the New York State Board may enforce the State Act "at least" until such time as the National Labor Relations Board *assumes* jurisdiction. *Davega City Radio, Inc.* v. *State Labor Relations Board,* 281 N. Y. 13 (1939). Whenever the National Labor Relations Act operates in a field occupied by the Wisconsin Labor Act, state power is merely suspended, at most, but lives on. *Allen Bradley Local No. 1111* v. *Wisconsin Employment Relations Board,* 62 S. Ct. 820 (1942). It has been so held in the field of telephone rate regulations. *Northwestern Bell Telephone Company* v. *Nebraska State Ry. Comm.,* 297 U. S. 471 (1936).

Hence, under the authority of these precedents, the Wisconsin Labor Relations Board had jurisdiction to act and conclude the matters in this case prior to the entry of the National Labor Relations Board. Contrary to the assumption of the Circuit Court of Appeals in its decision in this case, petitioner cited the authority of *Wisconsin Labor Relations Board* v. *Fred Rueping Leather Company,* 228 Wis. 473 (1938), only for this proposition.

The question which has not yet been determined definitely in the field of labor disputes is that which petitioner contends for here, namely, that the power of the National Board to assume jurisdiction in this field is terminated by the conclusion and dismissal of the issues by the Wisconsin Board prior to the time that the National Board first sought to interpose.

Admittedly, as pointed out in the "Summary" in the foregoing petition, the National Board failed to enter this case until after the State Board took its concluding steps and dismissed the case. For the National Board to assume jurisdiction, it is not sufficient alone that the National Labor Relations Act exist, but the Board itself must act in relation to the facts of the particular instance.

> "* * * It is the exercise of Federal jurisdiction under an actual law, and not the passage of the law, which ousts state courts or agencies from jurisdiction to act."
>
> 2 *Labor Disputes and Collective Bargaining*, Teller (1940) Section 270.

To exercise jurisdiction means to take control of the controversy. *Davega City Radio, Inc.* v. *State Labor Relations Board*, 281 N. Y. 13 (1939). Analogously, state utility rates can be supplanted only by an actual rate "administratively determined by the Interstate Commerce Commission itself." *Northwestern Bell Telephone Company* v. *Nebraska State Ry. Comm.*, 297 U. S. 471, 480 (1936). As previously stated, it is the practice of both the Wisconsin and the National Boards to dismiss charges filed with them, where no complaint has issued, by informal communication of such dismissal to the potential respondent, if any communication is given at all, and by no further evidence of dismissal than is presented in the facts before us. That practice of the National Board has been applied and upheld in such a way, in a reverse situation, as to substantiate respondent's contention here. *John A. Fedor*,

Tepco Employees' Union v. *The Enamel Products Company*, (Court of Common Pleas, Cuyahoga County, Ohio, 1940) 2 C. C. H. Labor Cases, Section 18,749.

The principle of the foreclosure of jurisdiction of the National Board upon the conclusion and dismissal of the issues by the Wisconsin Board, prior to the time when the National Board first seeks to interpose, has been applied in analogous circumstances. So in regard to identical Federal and State laws regarding closed seasons so game birds. *Carey* v. *South Dakota*, 250 U. S. 118 (1918). So in the matter of Federal and Ohio legislation prohibiting the sale of prison-made goods. *Whitfield* v. *Ohio*, 297 U. S. 431 (1936). So in the matter of State and Federal utility rates. *Northwestern Bell Telephone Company* v. *Nebraska State Ry. Comm.*, 297 U. S. 471 (1936). In the latter case, in emphasizing the policy involved, the court said, p. 478:

> "It cannot be supposed that Congress intended * * * to preclude all regulations, State and National, * * * for an indefinite time, until the I. C. C. could act administratively to prescribe rates."

See 11 *Am. Jur., Commerce*, Section 26. Respondent submits that an important principle is involved, to-wit, the power to act implies the power to conclude. Existing precedents, without interruption, as reviewed here, have conceded the power of the Wisconsin Board to act in this case prior to the entry of the National Board. Such power to act would be meaningless if it did not carry with it the power to finally determine the issues in a binding manner upon the parties involved. Otherwise, the law would hold no certainty, and the principles of concurrent jurisdiction and the right of the state to act at all would be a farce. If the State can compel parties to recognize its jurisdiction, as here, those parties must be permitted to rely upon the determination reached by the state. As previously indicated, it is not necessary

to extend this principle to a situation not involved here where the State may not have concluded its assumption of jurisdiction.

The question is one of gravest importance and novelty, both to the Government and to the public. The growing number of state labor laws increase the potentiality of conflicting jurisdictions between State and National Labor Relations Boards. The predicament of the employer in the present case illustrates the future of employers throughout the forty-eight states unless an early and immediate determination of the problem is handed down by this Court.

II. The Writ Should Be Allowed Because of the Serious Conflict in Decisions, Not Only With the Decisions of This Court, But Also With Those of the Various Circuit Courts of Appeals, in the Holding of the Circuit Court of Appeals for the Seventh Circuit That This Employer's Public Expression of His Views on Labor Relations in General Condemnation of Union Racketeering and Interference, Without Specific Reference to Any One Union or Racketeer, Is an Unfair Labor Practice Under Section 8(1) of the National Labor Relations Act, and Constitutes Substantial Evidence to Support a Finding of an Unfair Labor Practice Under Section 8(3) of the Act.

Petitioner submits that the present case, by virtue of the holding of the Board and the Circuit Court of Appeals to the effect that such employer's expressions alone constituted unfair labor practices (R. 97), falls within the condemnation of this Court's decision in *National Labor Relations Board* v. *Virginia Electric Light & Power Company*, 86 L. Ed. (Adv. Op.) 306 (1941), in which the Court said:

> "It is clear that the Board specifically found that those utterances were unfair labor practices, and it does not appear that the Board raised them to the

> stature of coercion by reliance on the surrounding circumstances. If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone."

Likewise, and in particular, where the employer emphasizes his true position to the employees through posted notices, as in the instant case, *National Labor Relations Board* v. *Sands Manufacturing Company*, 306 U. S. 332 (1939).

Under like circumstances, the various Circuit Courts of Appeals have gone no further than to grant that such expressions constitute no more than a violation of Section 8(1) of the Act, but certainly not of Section 8(3) of the Act. *Foote Bros. Gear & Machine Corp.* v. *National Labor Relations Board*, 114 F. (2d) 611 (C. C. A. 7th, 1941); *National Labor Relations Board* v. *Walter Stover*, 114 F. (2d) 513 (C. C. A. 10th, 1940).

Without further discussion here, the Court is respectfully referred to further cases cited in the second paragraph of that section of the petition entitled "Reasons Relied on for the Allowance of the Writ."

III. The Writ Should Be Allowed Because of the Conflict in Decision Arising Through the Holding of the Circuit Court of Appeals Here That This Employer Is Charged With the Expressions of Opinion on Labor Relations Made by a Minor Supervisory Employee, With Power Only to Recommend Hiring and Firing, and With No Authority From the Employer or Knowledge by the Employer in Regard to the Making of Such Statements.

It would seem that the vastly confused field of decisions in regard to the employer responsibility for expressions and actions of minor supervisory officials, with as little authority and with as little weight with employees as is exemplified by the case at bar, has not yet been resolved by the decisions of this Court. Precedents cited in para-

graph 3 of that section of the foregoing petition entitled "Reasons Relied on for the Allowance of the Writ" demonstrate but a portion of this confusion. Further clarification would seem necessary at this time.

IV. The Writ Should Be Allowed Because of Conflict in Decisions Created Through the Holding of the Circuit Court of Appeals Here That, Where the Board Finds Both a Legitimate and Illegitimate Motivation for the Acts Complained of, It May Guess That the Illegitimate Motive Was the Operative Cause and Conclude Thereon That an Unfair Labor Practice Had Been Committed.

Contrary precedents set forth in paragraph 4 of that section of the foregoing petition entitled "Reasons Relied on for the Allowance of the Writ" are characterized by the position of the Wisconsin Supreme Court in *Wisconsin Labor Relations Board* v. *Fred Rueping Leather Company*, 228 Wis. 473 (1938), under sections of the Wisconsin Labor Act identical to the National Labor Relations Act, that a Labor Board Order of Reinstatement cannot be sustained where the findings do not clearly determine the absence of a valid cause for the discharge.

V. The Writ Should Be Granted Because of the Conflict in Decisions Created by the Holding of the Circuit Court of Appeals Here That the Board May Validly Order the Employer to Cease and Desist From Violations of All of the Provisions of the National Labor Relations Act, Upon a Proper Showing of Violation of Sections 8(1) and 8(3) of That Act.

Paragraph 1(b) of the Board's Order (R. 99), repeated by the Court in its Decree (R. 462), requires petitioner to cease and desist from in any manner violating any provisions of Section 7 of the Act. As such it is too broad and should be stricken from the order, as being in conflict with the rules of this Court in the case of *National Labor Rela-*

tions Board v. *Express Publishing Company*, 312 U. S. 427 (1941). An appropriate order would go no further than to restrain petitioner from the commission of the specific unfair labor practices found to have been indulged in. There are no circumstances in this case warranting a broader order, there being no threat of continuing or varying efforts to attain the same end in the future, assuming that the Board has proved past unfair labor practices. The testimony indicates no act in relation to employees which cannot be remedied by the paragraphs of the Order specifically referring to the employees allegedly discriminated against.

The principle and the rule has been applied similarly in cases cited by other Circuit Courts of Appeals, as set forth in paragraph 5 of that section of the foregoing petition referred to as "Reasons Relied on for Allowance of the Writ."

This Court has itself applied similar principles in analagous situations. *Swift & Company* v. *United States*, 196 U. S. 375 (1905) (Sherman Anti-Trust Act involved); *New York, N. H. & H. R. R. Company* v. *I. C. C.*, 200 U. S. 361 (1906) (Interstate Commerce Act involved); *Federal Trade Commission* v. *Gratz*, 253 U. S. 421 (1920) (Federal Trade).

VI. The Writ Should Be Granted Because of Conflict in Decisions Created by the Holding of the Circuit Court of Appeals Here That Board May Validly Order the Reinstatement, With Back Wages, of Employees Guilty of Violations of the Important Rules of the Company and the Criminal Statutes of the State of Wisconsin.

Petitioner respectfully suggests that the criminal acts committed in the instant case fall within the restraints imposed by this Court in the cases of *National Labor Relations Board* v. *Fansteel Metalurgical Co.*, 306 U. S. 240 (1939), and *Southern Steamship Company* v. *National*

Labor Relations Board, 62 S. Ct. 886, 1942, even though it be assumed that unfair labor practices had been committed.

Reinstatement with back wage orders have been held invalid under facts nearly identical with those presented in the case at bar. *Martel Mills Corp.* v. *National Labor Relations Board,* 114 F. (2d) 624, C. C. A. 4th (1940) (See cases cited in paragraph 6 of that section of the foregoing petition entitled "Reasons Relied on for the Allowance of the Writ"). A similar result has been reached for violation of important rules of a company. *National Labor Relations Board* v. *Empire Furniture Corporation,* 107 F. (2d) 92 (C. C. A. 6th, 1939). (See further cases at paragraph 6 of the section of the foregoing petition referred to as "Reasons Relied on For the Allowance of the Writ.") And even though no conviction were sought in the case at bar, the criminal acts fall within the crimes barring reinstatement orders set forth in *Republic Steel Corporation* v. *National Labor Relations Board,* 107 F. (2d) 472 (C. C. A. 3d, 1939).

VII. The Writ Should Be Allowed Because of the Conflict of Decisions Created by the Holding of the Circuit Court of Appeals Here That the Board May Validly Order Payment of Back Wages Even Though Guilty of Laches in Bringing the Case to the Point of Enforcement.

A modification of the Order would seem to be necessary in conformity with the decisions of the various Circuit Courts of Appeals, as set forth in paragraph 7 of that section of the preceding petition entitled "Reasons Relied on for Allowance of the Writ," in view of the fact that, without explanation, the Board did not issue the intermediate report until seven months after the close of the hearing, on June 9, 1939, such report having been dated February 8, 1940; that the Order of the Board was not issued until November 23, 1940; that the petition for enforcement is dated May 29, 1941; and that during this entire period,

the Board permitted this petitioner's contingent liability to accumulate unreasonably and inequitably.

VIII. The Writ Should Issue Because of Conflict in Decisions Created by the Holding of This Circuit Court That the Board May Validly Order the Employer to Post Notices, Stating That the Employer Will Not Engage in the Unfair Labor Practices From Which It Is Ordered to Cease and Desist.

Paragraph 2(c) of the Board's Order (R. 100), as decreed and enforced by the Circuit Court of Appeals (R. 463), requires petitioner to post notices stating that petitioner will not engage in conduct from which it is ordered to cease and desist; that order is in direct conflict with the holding of the Circuit Courts of Appeals for the Fourth Circuit and for the Sixth Circuit, as found in the decisions set forth in paragraph 8 of that section of the foregoing petition entitled "Reasons Relied on For the Allowance of the Writ." A situation exists where the Seventh Circuit here permits such an Order, thus requiring the employer to admit guilt and liability by the notice, while two other circuits go no further than to permit the Board to require that a notice be posted, setting forth the Order of the Board, and that the Court approves of such Order. It would seem that the reasoning of the Fourth and Sixth Circuits far transcends that of the Seventh Circuit. Regardless, the conflict is firm.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a Writ of Certiorari, and thereafter reviewing and reversing said decision.

Respectfully submitted,

ROBERT C. BASSETT,
Counsel for Petitioner.

APPENDIX "A".

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7689. **October Term and Session, 1941.**

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*
vs.
ALGOMA NET COMPANY, *Respondent.*

Petition for the Enforcement of an Order of the National Labor Relations Board.

December 9, 1941.

Before KERNER and MINTON, *Circuit Judges,* and LINDLEY, *District Judge.*

KERNER, *Circuit Judge.* This is a petition to enforce an order of the National Labor Relations Board. The Board found that the respondent, the Algoma Net Company, by interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, 29 U. S. C. A. § 157, had engaged in unfair labor practices within the meaning of § 8(1), and by the discriminatory discharge of 3 and the lockout of 34 employees had violated § 8(3) of the Act, 29 U. S. C. A. § 158 1, 3. Upon these findings the Board ordered respondent to cease and desist from the unfair labor practices, to reinstate the employees with back pay, and to post appropriate notices.

The Algoma Net Company is a Wisconsin corporation, engaged in the manufacture and sale of fly nets, hammocks, and related products at Algoma, Wisconsin, employing about 150 persons. During the year ending July 31, 1938, it purchased raw materials valued at $140,000 and sold

finished products valued at $282,000. Approximately ninety percent in value of these raw materials and finished products came from and were shipped to points outside of the state of Wisconsin. The interstate character of respondent's business is admitted; the jurisdiction of the Board, however, is questioned on the ground that the Wisconsin Labor Relations Board assumed jurisdiction and dismissed the case before the National Labor Relations Board took or attempted to assume jurisdiction.

The record discloses that on February 8, 1939, a representative of the Wisconsin Labor Relations Board and a representative of the American Federation of Labor, hereinafter referred to as the Union, conferred with J. C. Anderegg, respondent's superintendent, to discuss charges which had been filed alleging that respondent had engaged in unfair labor practices by laying off Kaus, Ferron, and Trainor.

At a second conference on February 9, Anderegg agreed to reinstate Kaus on February 13, to reinstate Trainor and Ferron within 20 days or as soon as work was available, and to post a notice stating that respondent would not interfere in the employees' rights to self-organization. Kaus was reinstated, the notice was posted, and on February 16 Rauch, the representative of the Wisconsin Labor Relations Board, notified respondent that in view of the settlement he would recommend that the charges pending before the Wisconsin Board be withdrawn.

On February 20, respondent's manager, who had been absent from Algoma, returned. Upon receiving a report from the superintendent concerning the 3 employees, the manager directed that the 3 men be forthwith discharged and that 34 employees in Plant A be laid off until further notice. At the same time he wrote a letter to the Wisconsin Board requesting the Board to send a representative to Algoma. On February 25, Hendricks, representing the Wisconsin Board, conferred with manager E. W. Anderegg. At this conference Hendricks did not advise or request reinstatement of the 3 employees, but he did state, "I would forget about the whole thing just as if nothing had ever happened." On February 27 Plant A was reopened and the 34 employees were reinstated.

It is upon this state of the record that respondent rests its contention that the Board lacked jurisdiction. The argument is that the Wisconsin Board took jurisdiction of the case, thoroughly investigated it, and closed the matter, thereby foreclosing the jurisdiction of the National Board. In support of its contention counsel for the respondent cites, among other cases, *Wisconsin Labor Relations Board* v. *Fred Rueping Leather Co.*, 228 Wis. 473.

In the *Rueping Leather* case, *supra*, the Wisconsin Board filed a complaint against the Leather Company charging that the defendant had violated the Wisconsin Labor Relations Act. Over defendant's objections to the jurisdiction of the Wisconsin Board, the Board considered the merits of the charges and filed findings of fact. On appeal in the Supreme Court of Wisconsin the contention was that the National Labor Relations Act applied to the defendant and covered the same ground as the Wisconsin Labor Relations Act, § 111.01 *et seq.*, Wis. St., that it superseded the state act, and that the Wisconsin Board had no jurisdiction to enter the order which it sought to enforce. The court held that the National Labor Relations Act had not superseded the Wisconsin Labor Relations Act, but that the Wisconsin Board and the National Board had concurrent jurisdiction over interstate commerce labor disputes in Wisconsin, and stated (p. 492): "With the possibility of conflict in the administration of the state and national labor relations acts, we find no occasion to deal further than to state what is obvious: That in case there is conflict in a matter properly within the scope of the National Act, the state must yield. * * * We see no reason to anticipate and determine when and under what circumstances the state board is ousted of jurisdiction. That question is not here under the facts of this case, * * *. When they do, it will be time enough to attack the problems they present."

In our case, the nature of the charges filed before the Wisconsin Board does not appear in the record. The record is equally silent as to whether any witnesses were heard and findings of fact made. Save for the letter written by Rauch in which he stated he would recommend that the charges be withdrawn and the testimony of manager Anderegg that Hendricks said "I would forget about the

whole thing," no charges or disposition of the matter by the Wisconsin Board appears. Under this state of the record, we believe the National Board had jurisdiction.

We now proceed to a consideration of the merits. The respondent contends that there was no substantial evidence to support the findings of the Board. Our examination and consideration of the record has convinced us that the evidence amply sustains the finding that the respondent's coercion and interference with the union activities of its employees was a violation of § 8(1) of the Act. We pass to the question of violations of § 8(3) by discriminatory discharges.

The respondent contends that it laid off Gerald Kaus, Manuel Ferron, and Louis Trainor on February 6, because an accumulation of surplus stock in the beamer and cord department made necessary temporary adjustments in the working force. In support of this contention it emphasizes the following: that late in January and early in February, 1939, it was apparent that lay-offs would be necessary; that the supply of raw materials on hand was low and that no shipments were due; that little or no yarn for nets and hammocks was available and that this condition was reported to the foreman in charge approximately two weeks prior to February 4; that there was on hand in the cord department a large stock of material; that the customers' orders were at an extreme low and the seasonal production slump was at hand; that the plant's history indicated that this situation had occurred almost annually and had necessitated lay-offs; and that Kaus, Ferron, and Trainor had been frequently laid off for similar reasons.

Respondent also claims that these 3 employees were discharged for good cause and points to the fact that the testimony tended to prove that on the evening of February 7 Kaus and Ferron entered the boiler room of Plant "A" where they met Trainor; that Kaus, after stealing a key, entered Plant "B", demanded that employee Lumaye sign a Union application card, beat him up when he refused, and damaged respondent's goods; that Ferron entered the basement of Plant "A", invited employee Vincent away from his work and requested that Vincent join the Union; and that during these occurrences Trainor engaged night watchman Rasmussen in conversation.

Unquestionably the above evidence, taken by itself, does constitute grounds for lay-offs and discharge. Yet it is for the Board to determine all the facts in the case and appraise their relative weight. We shall not go into complete detail, but shall refer only to some of the circumstances upon which the Board relied. It appears that these 3 men were old and experienced employees; that on February 4 Kaus called a meeting of respondent's employees under the auspices of the Union; that Fisher, a foreman of the hammock department having power to recommend the hiring and discharging of employees, his acts being attributable to respondent (*New Idea, Inc.* v. *National Labor Relations Board*, 117 F. (2) 517), warned Ferron that "anybody that goes to that meeting or signs up to join the Union is fired." When Trainor returned to the plant after the meeting, Fisher stated: "It will be too bad Monday for some fellows." He also told another employee that manager E. W. Anderegg "would be angry at the union activities" and that "the fellows was liable to be discharged." Both Fisher and Anderegg denied making the statements attributed to them. Kaus, Ferron, and Trainor joined the Union and were appointed a committee to solicit members. On Monday, February 6, each was notified of his lay-off. On the following day a new man was hired and put on an operation requiring from six month's to a year's experience; during a previous slack period, Kaus had been retained and Bero, another employee, who had been retained on February 6, was laid off because Kaus was a more versatile and valuable employee. In previous years Trainor had been night foreman in the hammock department. Although Cravillion displaced Trainor, the respondent retained four junior employees who had been hired since January 15 in preference to Kaus, Ferron, and Trainor.

On the evening of February 7, Kaus and Ferron went to Plant "A". When they arrived they found Trainor there talking to the night watchman. Kaus asked the night watchman for the key to Plant "B" so that he could speak to Lumaye. Rasmussen, the night watchman, replied that the keys were lying on the water pump. Kaus took the keys and went to Plant "B" and asked Lumaye why he had no kept an appointment with him (Kaus) in the after-

noon. An argument ensued during which Kaus struck Lumaye, tearing his shirt. February 8, Lumaye reported the incident to superintendent Anderegg, who advised Lumaye to "just leave it ride," and directed the respondent's chief clerk to make out a report that Kaus had been discharged for misconduct.

We have already related what occurred between February 8 and 20, and that manager Anderegg had written a letter to the Wisconsin Board. That letter was published in the local papers and a copy was posted in the plant. In this letter, among other things, manager Enderegg said:

> "The writer, upon his return from a recent trip, finds that labor trouble developed during his absence, which we understand was started by an outside labor leader, and also taken part in by a member of your board.
>
> * * * during our twenty-five years of existence this is the first labor trouble we have ever had * * *.
>
> We employ approximately 100 people and for a number of years now we have never asked an employee to work for us; * * * right now we have a hundred or more applications waiting for positions, * * * we never had any trouble before and wouldn't have any now if it wasn't for outsiders coming in here and meddling in our affairs.
>
> This is the largest amount of stock ever carried by us, and we expected to carry right on * * * but if we are going to have some labor racketeer come in here and try and tear down our business, we want to know it right now * * *.
>
> We are closing down Plant A today, which will throw out of work about half of our employees, as we feel it is unsafe to build up further stock under present chaotic conditions, and before we resume operations we would like to have a show-down on this affair so that we know where we are at.
>
> * * * we are not going to let some outside element come in here and tear down our business at this stage of the game. If there is any danger of this, we are going to nip it in the bud before it starts and get our money out of this business while the getting is good."

On March 18, manager Anderegg and Kamaroff, a representative of the Board, agreed to reinstate the three discharged employees. When the men presented themselves for reinstatement they were requested to sign a statement admitting they had been discharged for misconduct. They refused to sign. Thereupon Kamaroff again spoke to Anderegg and Anderegg agreed to reinstate the men upon their promise to obey company rules. He requested that the men report to his office on March 20, but the men, not having been informed soon enough of Anderegg's request, reported to Anderegg on March 21 and were told, "It is too late now, there is no room for you fellows now." They were never rehired, although between February 20 and June 5, respondent hired 46 new employees.

The Board resolved the conflicts in the testimony in favor of the petitioner and from all the evidence found that by releasing Kaus, Ferron and Trainor on February 6, by discharging Kaus on February 21, and by locking out the employees in Plant "A" between February 21 and 27, 1939, respondent had discriminated in regard to their hire and tenure of employment, and that the sole ground of their discharge and lock out was their active participation in union affairs. We think there was ample evidence upon which to base the Board's finding.

Respondent makes the point that the order is invalid because it directs the respondent to cease and desist from, in any manner, violating any of the provisions of § 7 of the Act. *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426. We believe the Express Publishing case is not applicable and that under the circumstances here appearing the order is valid.

We have considered all of the contentions made by respondent and find no error has intervened. The request for the enforcement of the order is granted.

APPENDIX "B."

Wisconsin Statutes.

(For 1937.)

"340.41. ASSAULT, GREAT BODILY HARM. Any person who shall assault another with intent to do great bodily harm shall be punished by imprisonment in the state prison not more than three years nor less than one year, or in the county jail not more than one year, or by fine not exceeding five hundred dollars nor less than one hundred dollars.

"340.57. ASSAULT AND BATTERY. Any person who shall commit an assault and battery upon another shall be punished by imprisonment in the county jail not more than six months nor less than ten days, or by fine not exceeding one hundred dollars nor less than one dollar, or by both such fine and imprisonment in the discretion of the court.

"343.11. BREAKING OFFICE, CAR, ETC., FOR FELONIOUS PURPOSES. Any person who shall break and enter in the nighttime any office, shop, or warehouse, or any other building not adjoining or occupied with any dwelling house, or any ship, steamboat, vessel, railroad freight car, or passenger car, with the intention to commit the crime of murder, rape, robbery, larceny, or other felony shall be punished by imprisonment in the state prison not more than ten years, nor less than one year, or by imprisonment in the county jail for not more than one year, provided that nothing herein shall be held to remit any penalty for offenses heretofore committed.

"343.12. ENTRY AT NIGHT, BREAKING AT DAY. Any person who shall enter in the nighttime, without breaking, or shall break and enter in the daytime any dwelling house or any outhouse, thereto adjoining and occupied therewith, or any office, shop or warehouse or other building, or any ship, steamboat or vessel, railroad freight car or passenger car, with intent to commit the crime of murder, rape, robbery, larceny or other felony shall be punished by imprisonment

in the state prison not more than three years nor less than one year, or by imprisonment in the county jail not more than one year.

"353.05. ACCESSORY TO FELONY. Every person who shall be aiding in the commission of any offense which shall be a felony or who shall be accessory thereto before the fact by counseling, hiring or otherwise procuring such felony to be committed, shall be punished in the same manner as is, or shall be, prescribed for the punishment of the principal felony.

"353.31. FELONY. The term 'felony' when used in any statute, shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished by imprisonment in a state prison."

APPENDIX "C."

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

National Labor Relations Board,
Petitioner,
vs.
Algoma Net Company,
Respondent.
} No. 7689.

Notice of Application.

To: Ernest A. Gross,
Attorney for Petitioner.

PLEASE TAKE NOTICE that the respondent has filed the attached application with the United States Circuit Court of Appeals for the Seventh Circuit, in the City of Chicago, State of Illinois, on March 31, 1942, making application thereby for an order staying the enforcement decree of the Court in the above entitled cause.

Dated March 30, 1942.

ROBERT C. BASSETT,
Attorney for Respondent.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

National Labor Relations Board,
Petitioner,
vs.
Algoma Net Company,
Respondent.
No. 7689.

Application for Stay.

Petition of ALGOMA NET COMPANY, respondent above named, for an Order further staying the execution and enforcement of the Decree of the United States Circuit Court of Appeals for the Seventh Circuit, to enable said respondent to apply for and obtain Writ of Certiorari from the Supreme Court of the United States.

To OTTO KERNER, Judge of the United States Circuit Court of Appeals for the Seventh Circuit:

Your petitioner, ALGOMA NET COMPANY, respectfully presents this, its application for an order further staying the execution and enforcement of the decree of the United States Circuit Court of Appeals for the Seventh Circuit, rendered in the above cause on January 3, 1942, based upon the decision of the court, issued on December 9, 1941, under the provisions of Section 350 of Title 28 of the United States Code, to enable said petitioner to apply for and obtain a Writ of Certiorari from the Supreme Court of the United States.

In successive orders, this Court granted stays of enforcement of the decree for a period of three months from January 3, 1942, being the date of entry of the decree. As will appear from petitioner's applications, the necessity for the full ninety days' stay lay principally in the fact that petitioner's counsel was not admitted to practice before the United States Supreme Court, could not, therefore, file petition and brief and transcript of record, and

was having practical difficulties in reaching Washington for personal admission.

On March 16, 1942, respondent's counsel appeared before the United States Supreme Court, and was admitted to practice, this being the earliest possible date upon which counsel could do so; immediately following, counsel returned to his office for the purpose of perfecting the application for the Writ of Certiorari. Counsel has already authorized the Clerk of this Court to forward the certified copy of transcript of record to the Clerk of the United States Supreme Court, such work has been done, and petitioner has already paid therefor.

As has been stated in previous applications to this court, petitioner's petition and supplementing brief for Writ of Certiorari have been prepared and made ready for submission, except as to the appropriate references to the printed record. It now appears from communications with the Clerk of the United States Supreme Court that it is physically impossible for the transcript of the record to be printed in time for counsel to insert such references to the printed record in the petition and brief for the Writ. As a consequence, petitioner has applied to the United States Supreme Court, under application dated March 28, 1942, for an extension of time of thirty days within which to file the Writ of Certiorari.

In order that the position of the parties might not be changed, to the irreparable injury of this petitioner, application is now being made to this Court for an additional stay of the enforcement of its decree, of thirty days, to and including May 3, 1942, being co-extensive with the extension applied for within which to file the Writ of Certiorari.

As is amply illustrated by the expense to which petitioner has already gone in sending counsel to Washington, D. C. for admission to practice and sending up the certified copy of transcript of record, the petitioner's intention to complete its application for the writ is a bona fide one, and this petition is not made for the purpose of unnecessary delay.

Respondent realleges the statements in its applications for stay under dates of December 27, 1941, January 27,

1942, and February 24, 1942, in support of this application and the additional request that further stay be granted without bond or other security.

WHEREFORE, respondent respectfully requests that this court grant an additional stay at this time, without bond, for a period of thirty days, to and including May 3, 1942.

Dated March 28, 1942.

ROBERT C. BASSETT,

Attorney for Respondent.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

National Labor Relations Board,
Petitioner,
vs.
Algoma Net Company,
Respondent.
No. 7689.

Affidavit of Mailing.

STATE OF WISCONSIN, }
COUNTY OF BROWN. } ss.

MURIEL EBENREITER, being duly sworn, on oath deposes and says:

That she is a clerk in the Law Offices of Minahan & Bassett, 108 Columbus Building, Green Bay, Wisconsin, and that she is over the age of twenty-one (21) years, and a citizen of the United States;

That on March 30, 1942, she deposited in the Federal Post Office at Green Bay, Wisconsin, in a sealed envelope, with the return address thereon, with postage prepaid thereon, the following:

Copy of respondent's application for a stay of enforcement of decree, together with a Notice of Application for such purpose in the above entitled matter, to Mr. Ernest A. Gross, Associate General Counsel, National Labor Relations Board, Washington, D. C.

MURIEL EBENREITER.

Subscribed and sworn to before me March 30, 1942.

OLGA M. SCHILKE,
Notary Public,
Brown County, Wisconsin.

My commission expires 7-23-44.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit,

1212 Lake Shore Drive,
Chicago, Illinois.

April 4, 1942.

NOTICE.

This Court today entered an order in Cause No. 7689, *N. L. R. B.* v. *Algoma Net Co.*—staying the execution and enforcement of the decree of this Court in this cause for 30 days, or to and including May 3, 1942, and if within such 30 days there is filed with this Court a certificate of the Clerk of the Supreme Court certifying that the certiorari petition, record and brief have been filed, then the stay of execution and enforcement of the decree shall continue until final disposition of the Supreme Court.

KENNETH J. CARRICK,
Clerk.

EXHIBIT "D".

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

National Labor Relations Board,
Petitioner.
vs.
Algoma Net Company,
Respondent.
No. 7689.

Notice of Application.

To: Ernest A. Gross,
Attorney for Petitioner.

PLEASE TAKE NOTICE that the respondent has filed the attached application with the United States Circuit Court of Appeals for the Seventh Circuit, in the City of Chicago, State of Illinois, on May 2, 1942, making application thereby for an order staying the enforcement decree of the Court in the above entitled cause.

Dated May 1, 1942.

ROBERT C. BASSETT,
Attorney for Respondent.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

National Labor Relations Board,
Petitioner,
vs.
Algoma Net Company,
Respondent.
No. 7689.

Application for Stay.

Petition of ALGOMA NET COMPANY, respondent above named, for an Order further staying the execution and enforcement of the Decree of the United States Circuit Court of Appeals for the Seventh Circuit, to enable said respondent to apply for and obtain Writ of Certiorari from the Supreme Court of the United States.

To OTTO KERNER, Judge of the United States Circuit Court of Appeals for the Seventh Circuit:

Your petitioner, ALGOMA NET COMPANY, respectfully presents this, its application for an order further staying the execution and enforcement of the decree of the United States Circuit Court of Appeals for the Seventh Circuit, rendered in the above cause on January 3, 1942, based upon the decision of the court, issued on December 9, 1941, under the provisions of Section 350 of Title 28 of the United States Code, to enable said petitioner to apply for and obtain a Writ of Certiorari from the Supreme Court of the United States.

In the successive orders, this Court granted stays of enforcement of its decree to and including May 3, 1942. As will appear from the petitioner's applications, the necessity for the extensions lay principally in the fact that petitioner's counsel was not admitted to practice before the United States Supreme Court, could not, therefore, file petition and brief and transcript of record, and was having practical difficulties in reaching Washington for personal admission. These difficulties having been obviated, and counsel having been admitted, the Supreme Court of the United States granted petitioner an exten-

sion of thirty days to and including May 3, 1942, within which to file its petition for certiorari.

During the thirty days extension, the time was entirely consumed by communications between petitioner, the National Labor Relations Board, the Clerk of the Supreme Court of the United States, and this petitioner's counsel, in entering a stipulation for the printing of the record, securing the Clerk's estimate of the cost of printing, and receiving delivery of respondent's check to cover that cost.

Respondent has on this day forwarded to the Clerk of the United States Supreme Court its check in the amount of One Hundred and Sixty dollars ($160), to cover the cost of printing the transcript of record, together with its application for a further thirty day extension of time within which to file the petition for certiorari. Had petitioner realized the practical delays involved in these transactions, it would have requested the full sixty days extension period contemplated by 28 U. S. C. A. Section 350 at the outset.

In order that the position of the parties might not be changed, to the irreparable injury of this petitioner, application is now being made to this court for an additional and final stay of the enforcement of the decree for thirty days, to and including June 3, 1942, being co-extensive with the extension applied for from the United States Supreme Court within which to file the Writ of Certiorari.

As is amply illustrated by the expense to which petitioner has already gone in sending counsel to Washington, D. C., for admission to practice and sending up the certified copy of the transcript of record, as well as forwarding its check for the printing of the record, petitioner's intention to complete its application for the writ is a bona fide one, and this petition is not made for the purpose of unnecessary delay.

Respondent realleges the statements in its previous applications in support of this application, and the additional request that further stay be granted without bond or other security.

WHEREFORE, respondent respectfully requests that this court grant an additional stay at this time, without bond, for a period of thirty days, to and including June 3, 1942.

Dated May 1, 1942.

ROBERT C. BASSETT,
Attorney for Respondent.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

National Labor Relations Board,
Petitioner,
vs.
Algoma Net Company,
Respondent.
No. 7689.

Affidavit of Mailing.

STATE OF WISCONSIN, }
COUNTY OF BROWN. } ss.

MURIEL EBENREITER, being duly sworn, on oath deposes and says:

That she is a clerk in the Law Offices of Minahan & Bassett, 108 Columbus Building, Green Bay, Wisconsin; that she is over the age of twenty-one years, and a citizen of the United States;

That on May 1, 1942, she deposited in the Federal Post Office at Green Bay, Wisconsin, in a sealed envelope, with the return address thereon, with postage prepaid thereon, the following:

> Copy of respondent's application for a stay of enforcement of decree, together with a Notice of Application for such purpose in the above entitled matter, to Mr. Ernest A. Gross, Associate General Counsel, National Labor Relations Board, Washington, D. C.

MURIEL EBENREITER.

Subscribed and sworn to before me May 1, 1942.

OLGA SCHILKE,
Notary Public, Brown County, Wisconsin.

My commission expires 7-23-44.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit,

1212 Lake Shore Drive,

Chicago, Illinois.

May 2, 1942.

NOTICE.

This Court today entered an order in Cause No. 7689 further staying execution of the decree to and including June 3, 1942.

KENNETH J. CARRICK,
Clerk.

APPENDIX "E".

Wisconsin Statutes, 1937.

CHAPTER 111.

"111.07. RIGHTS OF EMPLOYES. Employes shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection. Nothing contained herein shall be deemed to prevent an employer from entering into an 'all-union agreement', as hereinbefore defined, with a labor organization or labor organizations.

"111.08. WHAT ARE UNFAIR LABOR PRACTICES. It shall be an unfair labor practice for an employer:

(1) To interfere with, restrain or coerce employes in the exercise of the rights guaranteed in section 111.07.

* * * * *

(3) By discrimination in regard to hire or terms of tenure or other conditions of employment to discourage membership in any labor organization or encourage membership in any company union."

In the Supreme Court of the

October Term

Algoma Net Company, Petitioner

v.

National Labor Relations

On Petition for a Writ of Certiorari
to the United States Circuit Court of Appeals
Circuit

Brief for the National Labor
in Opposition

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Argument	9
Conclusion	18
Appendix	19

CITATIONS

Cases:

Board of Commissioners v. *United States*, 308 U. S. 343	16
Bussman Mfg. Co. v. *National Labor Relations Board*, 111 F. (2d) 783	12
Chesapeake & Delaware Canal Co. v. *United States*, 250 U. S. 123	17
Cleveland etc. Ry. v. *United States*, 275 U. S. 404	10
Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197	10
H. J. Heinz Co. v. *National Labor Relations Board*, 311 U. S. 514	12
International Association of Machinists v. *National Labor Relations Board*, 311 U. S. 72	12
National Labor Relations Board v. *A. S. Abell Co.*, 97 F. (2d) 951	17
National Labor Relations Board v. *Aluminum Products Co.*, 120 F. (2d) 567	17
National Labor Relations Board v. *American Mfg. Co.*, 106 F. (2d) 61, modified and affirmed, 309 U. S. 629	15
National Labor Relations Board v. *Automotive Maintenance Machinery Co.*, No. 188, this Term, decided February 16, 1942	13
National Labor Relations Board v. *Bachelder*, 120 F. (2d) 574, certiorari denied, 314 U. S. 647	10, 17
National Labor Relations Board v. *Colten*, 105 F. (2d) 179	15
National Labor Relations Board v. *Electric Vacuum Cleaner Co.*, No. 588, this Term, decided March 30, 1942	13, 16
National Labor Relations Board v. *Express Publishing Co.*, 312 U. S. 426	13, 17
National Labor Relations Board v. *Fansteel Metallurgical Corp.*, 306 U. S. 240	15
National Labor Relations Board v. *Isthmian Steamship Co.*, 126 F. (2d) 598	16

Cases—Continued. Page

National Labor Relations Board v. *Link-Belt Co.*, 311 U. S. 584 ---- 12

National Labor Relations Board v. *Louisville Refining Co.*, 102 F. (2d) 678 ---- 17

National Labor Relations Board v. *Mall Tool Co.*, 119 F. (2d) 700 ---- 17

National Labor Relations Board v. *Nevada Consolidated Cooper Corp.*, No. 774, this Term, decided April 27, 1942 ---- 12, 13

National Labor Relations Board v. *Reed & Prince Mfg. Co.*, 118 F. (2d) 874, certiorari denied, 313 U. S. 595 ---- 15

National Labor Relations Board v. *Sands Mfg. Co.*, 306 U. S. 332 ---- 12

National Labor Relations Board v. *Stackpole Carbon Co.*, 105 F. (2d) 167, certiorari denied, 308 U. S. 605 ---- 15

National Labor Relations Board v. *Superior Tanning Co.*, 117 F. (2d) 881, certiorari denied, 313 U. S. 559 ---- 17

National Labor Relations Board v. *Virginia Electric & Power Co.*, 314 U. S. 469 ---- 11

National Labor Relations Board v. *Wilson Line, Inc.*, 122 F. (2d) 809 ---- 16

Norristown Box Co. v. *National Labor Relations Board*, No. 993, this Term, certiorari denied, April 13, 1942 ---- 11

North Electric Mfg. Co. v. *National Labor Relations Board*, No. 931, this Term, certiorari denied, March 16, 1942 ---- 11

Northwestern Bell Telephone Co. v. *Nebraska State Ry. Comm.*, 297 U. S. 471 ---- 10

Owens-Illinois Glass Co. v. *National Labor Relations Board*, No. 985, this Term, certiorari denied, April 6, 1942 ---- 14

Phelps Dodge Corp., v. *National Labor Relations Board*, 113 F. (2d) 202, affirmed 313 U. S. 177 ---- 16

Republic Steel Corp. v. *National Labor Relations Board*, 107 F. (2d) 472, certiorari denied, 309 U. S. 684 ---- 15

Southern Steamship Co. v. *National Labor Relations Board* No. 320, this Term, decided April 6, 1942 ---- 15

Triplex Screw Co. v. *National Labor Relations Board*, 117 F. (2d) 858 ---- 16

Wilson & Co. v. *National Labor Relations Board*, No. 1189, this Term, certiorari denied, June 1, 1942 ---- 14

Miscellaneous:

Employee Misconduct Under The Wagner Act; Developments Since The Fansteel Case, 39 Col. L. Rev. 1369 ---- 15

Statute:

National Labor Relations Act, Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*:

Sec. 7 ---- 19

Sec. 8 ---- 19

Sec. 10 ---- 10, 19

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1256

ALGOMA NET COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 450–457) is reported in 124 F. (2d) 730. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 83–100) are reported in 28 N. L. R. B. 64.

JURISDICTION

The decree of the court below (R. 462–464) was entered on January 3, 1942. The time for filing a petition for a writ of certiorari was extended

by orders of Mr. Justice Byrnes to May 3, 1942, to May 15, 1942, and finally to May 25, 1942 (R. 471–472). The petition for a writ of certiorari was filed on May 25, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may proceed against a company, whose operations admittedly affect interstate commerce, after representatives of a state labor relations board have investigated similar charges against the same company and the latter board has failed to commence formal proceedings.

2. Whether the Board's finding that the petitioner violated Section 8 (1) of the Act should be set aside because it is based in part upon a patently threatening "open letter" addressed to a state labor relations board but distributed to the petitioner's employees.

3. Whether the Board erred in finding the petitioner to be responsible for the anti-union statements of a foreman who had power to recommend hiring and discharge.

4. Whether a finding of unfair labor practices is supported by substantial evidence where the record contains evidence which would also support a contrary finding.

5. Whether the Board abused its discretion in entering an order requiring petitioner to cease and desist from interfering in any manner with rights guaranteed by Section 7.

6. Whether the Board abused its discretion in entering an order requiring petitioner to reinstate employees who had engaged in minor misconduct.

7. Whether the Board abused its discretion in entering an order requiring petitioner to make whole the discharged employees notwithstanding that seventeen months intervened between the close of the hearing and the entry of the order.

8. Whether the Board abused its discretion in entering an order requiring petitioner to post notices that it will not engage in the conduct from which it has been ordered to cease and desist.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, p. 19.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 83–100). The facts found by the Board and shown by the evidence may be summarized as follows:[1]

[1] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

Early in February 1939, one Kaus, an employee of petitioner, called a meeting of the employees for Saturday, February 4, 1939, to organize a union affiliated with the American Federation of Labor, herein called the Union (R. 86; 153–156). At that time J. C. Anderegg, petitioner's Vice-President and Superintendent, and Fisher, a foreman,[2] warned various employees that those attending the meeting would be discharged (R. 86–87; 193–194, 175, 169–170, 171, 265–266). On Monday, February 6, Kaus and employees Trainor and Ferron, who with Kaus had joined the Union and been elected a committee to solicit Union members, were laid off (R. 87; 156, 157, 168, 175, 194). On the same day Superintendent Anderegg distributed copies of a notice to the employees warning them (R. 88; 214, 270), "Don't make the same mistakes others made."

Although petitioner contended that the lay-offs were attributable to necessary curtailment of operations, it departed from its previous practice of giving preference to old and experienced employees (R. 89; 150–151, 203, 205–206, 216–217, 211, 239–240, 265), and retained employees considerably junior to Kaus, Trainor, and Ferron (R. 89; 271, 272, 274); moreover, on the following day petitioner hired a new employee and later

[2] J. C. Anderegg had power to hire and discharge; Foreman Fisher was authorized to recommend hire and discharge, and his recommendations were usually followed (R. 86; 104, 242).

transferred an inexperienced man to Kaus's position (R. 89–90; 141–142, 261–265, 274, Tr. 413–414).

On the day following their lay-off, Kaus, Trainor, and Ferron visited Plant A to solicit Union members (R. 90; 158, 195–196). Kaus secured permission to take the Plant B keys from Watchman Rasmussen [3] and went into Plant B (R. 90; 144–145, 158–159, 177–178). There he had an altercation with employee Lumaye. Lumaye's shirt was torn and he was bruised slightly on the chest (R. 90; 158–159, 206–108); there was some minor property damage (R. 90; 207, Tr. 888, 971). On February 8, Superintendent Anderegg learned of this incident (R. 90–91; 134–135, 206–207) and, without discussing it with either Kaus or the watchman, discharged Kaus for the alleged misconduct (R. 91; 210, 217–218, Tr. 441, 565).

Later the same day, Superintendent Anderegg met with Rauch, a representative of the Wisconsin Labor Relations Board, and Heymanns, a Union representative, to discuss charges that petitioner had violated the Wisconsin Labor Relations Act by laying off Kaus, Trainor, and Ferron (R. 91; 137–140). At a second conference held

[3] In view of Rasmussen's failure to testify despite his presence at the hearing, the Board refused credence to an unsigned written statement purportedly setting forth his report to E. W. Anderegg that Kaus had "stolen the key" (R. 90; 144–145, 124, 215, 219–220, Tr. 606–608, 632, 721–722, 157).

on February 9, Superintendent Anderegg agreed to reinstate Kaus on February 13, and to consider his lay-off from February 6 to 13 punishment for the assault. He also agreed to reinstate Trainor and Ferron within 20 days, or as soon as work was available, and to post a notice prepared by Rauch stating that petitioner would not interfere with the employees' rights to self-organization (R. 91; 140–141, 160, 198, 269). Petitioner reinstated Kaus on February 13 and posted the notice. On February 16 Rauch notified petitioner that in view of the settlement he would recommend withdrawal of the charges pending before the Wisconsin Board (R. 91; 141, 160–161, 273).

On February 20, General Manager E. W. Anderegg,[4] who had been on vacation, returned and received from Superintendent Anderegg a report of the foregoing occurrences (R. 92; 103, 104–105, 212). On February 21, Manager Anderegg, without interviewing Kaus, Trainor, or Ferron, ordered their discharge and locked out the 34 employees in Plant A until "further notice" (R. 92–93; 106–107, 114–115, 121, 272). He removed the notice prepared by Rauch and posted both an announcement stating in part that "no employee has to join a union unless he chooses" (R. 93–94; 110–111, 237, 270) and an "open letter" to the Wisconsin Board stating, *inter alia,* that an "out-

[4] The Board's decision inaccurately states that E. W. Anderegg is president of petitioner (R. 92). M. W. Perry is president, but he is inactive (Tr. 877–878).

side labor leader" and "racketeer"[5] had started labor trouble in the plant, that petitioner was "not going to let some outside element come in here and tear down [its] business * * *," that Plant A was being closed because of "present chaotic conditions," and would remain closed until there was a "show-down," and that petitioner was "going to nip [this] in the bud * * *" (R. 92–93; 107, 267–269).

On or about February 25, Hendricks, a second representative of the Wisconsin Labor Relations Board, conferred with petitioner (R. 94; 120, 146–147, Tr. 691). Manager Anderegg testified that Hendricks stated at the end of the conference, "I would forget about the whole thing just as if nothing had ever happened" (R. 94; 147). Manager Anderegg thereafter reopened Plant A on February 27, reinstating the 34 laid-off employees (R. 94). The Wisconsin Board took no further action.[6]

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[5] Manager Anderegg testified at the hearing that these epithets referred to union organizer Heymanns and to Wisconsin Board representative Rauch (*supra*, p. 5, R. 93; 137, 156, 227–228).

[6] Hendricks was not called as a witness at the hearing and the Board found (R. 94) that the record was not clear as to the meaning of his statement. No copy of the charges before the Wisconsin Board was introduced in evidence; the Board concluded that the record did not sustain petitioner's contention that the charges had been settled or dismissed by the Wisconsin Board and accordingly found it unnecessary to "consider the effect, if any, which a settlement or dismissal of the charges before the Wisconsin Board would have on the present proceeding" (*id.*).

464724——42——2

On or about March 18, Kamaroff, a representative of the National Labor Relations Board, discussed with Manager Anderegg charges filed on March 7 by the Union with the National Labor Relations Board (R. 94); Anderegg then agreed to reinstate Kaus, Trainor, and Ferron provided they made applications at his office (R. 94; 231–233). When they appeared, however, Manager Anderegg offered to consider reinstating them only if they would sign a written statement admitting that they had been discharged for misconduct (R. 94; 129–130, 179–180, 233–234). Manager Anderegg also took this occasion to warn the three employees that "if the union is going to run my business I took 25 years to build it up and there is nobody come in here—coming in here to tear it down" (R. 94; 163, 180).

The following day, Kaus, Trainor, and Ferron reported the results of the conference to Kamaroff, who telephoned Manager Anderegg and secured his agreement to reinstate the employees on their oral agreement to obey company rules (R. 94–95; 235). In accordance with Manager Anderegg's request that the three report to his office on March 20 (*ibid.*), Kamaroff telegraphed the men but they did not receive the message until March 21, at which time they reported to petitioner (R. 95; 164, 186–187). Manager Anderegg declined to reinstate them, stating "too late now—you went to those 2 racketeers from out of town before you

came into the office" (R. 95; 165, 181–182, 198, 232, 120, 121, 129, 131–132).[7]

The Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act (R. 99). Its order requires petitioner (a) to cease and desist from its unfair labor practices and from in any manner interfering with the rights guaranteed in Section 7 of the Act; (b) to reinstate Kaus, Trainor, and Ferron; (c) to make whole Kaus, Trainor, and Ferron and the 34 employees who were locked out; and (d) to post appropriate notices (R. 99–100).

On May 31, 1941 (some two years after the charges were filed), the Board filed in the court below a petition for enforcement of its order (R. 442–447). On December 9, 1941, the court handed down its opinion (R. 450–456) and on January 3, 1942, entered its decree (R. 462–464), enforcing the Board's order in full.

ARGUMENT

1. Petitioner contends (Pet. 10, 20–25) that the Board was foreclosed from entertaining the charges and issuing its complaint because the Wisconsin Labor Relations Board had "concluded its administration and disposed of" the case. But as

[7] The Board found (R. 95) that Heymanns and Rauch (see note 5, *supra*, p. 7) were the "racketeers" here referred to.

the National Board's decision herein points out, there is no showing on this record that the Wisconsin Board had settled or dismissed the charges before it (*supra,* p. 7), so that the question of the effect which such action would have on the National Board's power is not presented. But if it were presented, it is clear that the National Board could not be foreclosed from acting by any prior action of the State Board, since Congress, acting within its constitutional authority, has provided in Section 10 (a) that the National Board's power to prevent unfair labor practices "shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." Cf. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 222–224; compare *Cleveland etc. Ry.* v. *United States,* 275 U. S. 404, 412; *Northwestern Bell Telephone Co.* v. *Nebraska State Ry. Comm.*, 297 U. S. 471, 479; *National Labor Relations Board* v. *Bachelder,* 120 F. (2d) 574, 576 (C. C. A. 7), certiorari denied, 314 U. S. 647.

2. Petitioner contends (Pet. 10–11, 25–26) that the Board erred in finding that petitioner's open letter of February 21 (R. 92–93, *supra,* pp. 6–7) violated Section 8 (1) of the Act (R. 97). The finding was proper. The letter declared that petitioner was locking out its employees because of the Union's efforts to organize them, threatened

to keep Plant A closed until there was a "show down," and stated that the Company would go out of business if an "outside element" came into the situation. There is no conflict with *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469. The Board's conclusion that the open letter was coercive was, as the decision makes clear (R. 96), "based on the totality of the Company's activities during the period in question" (*id.*, at p. 477).[8] Moreover, disregarding the letter, the Board's findings that Section 8 (1) and (3) was violated are adequately supported by other evidence.

3. Petitioner's claim (Pet. 11–12, 26–27) that the Board and the court below erred in holding petitioner responsible for the antiunion statements of Foreman Fisher is immaterial. The evidence establishes (Statement, pp. 4–9) that petitioner, through its manager and its vice president, engaged in conduct clearly violating Section 8 (1) and 8 (3). This evidence, quite apart from

[8] Nor is there conflict, as petitioner asserts, with a group of decisions in other cases in the circuit courts of appeals (Pet. 11, 25–26). The cases turned upon their particular facts. None of them holds that statements of an employer which are in fact coercive or intimidating do not constitute unfair labor practices. See the Board's briefs in opposition in *North Electric Mfg. Co.* v. *National Labor Relations Board*, No. 931, this Term, pp. 9–12, certiorari denied, March 16, 1942; and *Norristown Box Co.* v. *National Labor Relations Board*, No. 993, this Term, pp. 11–13, certiorari denied, April 13, 1942.

Fisher's statements, fully supports the Board's order. Moreover, petitioner's claim is without merit. Fisher was a foreman whose recommendations as to hiring and discharge were usually followed (*supra*, p. 4, note 2). Petitioner is responsible for the antiunion conduct of such a supervisor. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584.[9]

4. Petitioner's contention (Pet. 12–13, 27) that the Board may not properly find that an unfair labor practice has been committed where the record contains evidence which would also support a contrary finding is answered by *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, No. 774, this Term, decided April 27, 1942, reversing 122 F. (2d) 587 (C. C. A. 10).[10]

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[9] *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, cited by petitioner (Pet. 12), is not in point. Petitioner's claim of conflict with various decisions of the circuit courts of appeals (Pet. 12), even were it well-founded, does not call for review; this Court will not review a decision which is in accord with the controlling decisions of this Court merely because of the "conflict" created by other earlier lower court decisions which may have applied principles contrary to those subsequently declared by this Court.

[10] *Bussmann Mfg. Co.* v. *National Labor Relations Board*, 111 F. (2d) 783 (C. C. A. 8), cited by petitioner (Pet. 13), was relied on by the lower court in the *Nevada Consolidated* case (122 F. (2d), at 595). In its brief in this Court, the Board pointed out that the *Bussmann* case had applied the

5. Petitioner urges (Pet. 13–14, 27–28) that the provision of the order which restrains petitioner from in any manner infringing the rights guaranteed in Section 7 of the Act is invalid under the principles enunciated in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426. But in the *Express* case, this Court recognized that the "breadth of the order * * * must depend upon the circumstances of each case" (312 U. S., at 436). In that case there was only an isolated refusal to bargain collectively. In this case there is proof of numerous independent violations of Section 8 (1) which were of the same type as the order prohibits. This circumstance of itself suffices to support the order. Moreover, in this case the violations were so numerous and so varied and were committed with such open hostility to the Union as to furnish ample basis to believe that other violations might occur unless restrained—a second sufficient ground for the broad type of order. Provisions like the one here in controversy were enforced in *National Labor Relations Board* v. *Automotive Maintenance Machinery Co.*, No. 188, this Term, decided February 16, 1942; *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, No. 588, this Term, decided March 30, 1942; and *National Labor Re-*

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same mistaken principle as had the lower court in the *Nevada Consolidated* case. Brief for the National Labor Relations Board, No. 774, this Term, p. 46.

lations Board v. *Nevada Consolidated Copper Corp.*, No. 774, this Term, decided April 27, 1942. Contentions similar to that raised by petitioner were raised by the employers in *Owens-Illinois Glass Co.* v. *National Labor Relations Board*, No. 985, this Term, certiorari denied, April 6, 1942; and *Wilson & Co.* v. *National Labor Relations Board*, No. 1189, this Term, certiorari denied, June 1, 1942.[11]

6. Petitioner's contention (Pet. 14–15, 28–29) that it was improper for the Board to direct reinstatement of the three employees involved because they had violated the criminal statutes of Wisconsin and the company's rules assumes a set of facts (Pet. 3–4) differing from the concurrent findings of the Board and the court below (R. 90, 454–455).[12] Furthermore, even on the assumed facts, the misconduct which petitioner alleges is much less serious, both quantitatively and qualitatively, than the misconduct held to bar rein-

[11] Inasmuch as the instant decision is clearly in accord with the *Express* case, petitioner's claim of conflict with various lower court decisions (Pet. 13–14) is immaterial even if true. Cf. p. 12, note 9, *supra*. Furthermore, the claim does not appear to be well-founded, for the cited decisions turned upon their facts.

[12] Petitioner would have this Court assume that the criminal statutes were violated. It does not appear that charges were at any time preferred against the employees, or that they were ever arrested, tried, or convicted of any offense.

statement in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, and *Southern Steamship Co.* v. *National Labor Relations Board*, No. 320, this Term, decided April 6, 1942. The Circuit Courts of Appeals have uniformly held that the *Fansteel* decision does not require the Board to deny the normal remedy of reinstatement to employees who engage in the fisticuffs and other minor misconduct which are often the accompaniment of labor disputes.[13] In this case petitioner itself showed that it did not regard the misconduct of the employees as serious by twice offering to reinstate them (see pp. 6, 8, *supra*).

7. Petitioner contends (Pet. 15, 29–30) that the back-pay order should be modified because some 17 months elapsed between the close of the origi-

[13] *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. (2d) 874, 888 (C. C. A. 1), certiorari denied, 313 U. S. 595; *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61, 68 (C. C. A. 2), modified and affirmed, 309 U. S. 629; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 176 (C. C. A. 3), certiorari denied, 308 U. S. 605; *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472, 479 (C. C. A. 3), certiorari denied on this point, 309 U. S. 684; *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 183 (C. C. A. 6); Note, *Employee Misconduct Under The Wagner Act; Developments Since The Fansteel Case*, 39 Col. L. Rev. 1369.

464724—42——2

nal hearing and the issuance of the Board's decision,[14] and because another six months elapsed before the Board filed a petition for enforcement. As to the latter period, the short answer is that petitioner was free at any time to file a petition for review under Section 10 (f) of the Act. As to the former period, petitioner makes no showing that the delay was unreasonable nor does it assign any reason why the burden of delay should be thrust upon the innocent employees rather than upon petitioner whose wrongdoing is the root of the situation. Petitioner's claim is of a type which has been uniformly rejected. See, *e. g.*, *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, affirming in this respect 113 F. (2d) 202 (C. C. A. 2); *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.,* No. 588, this Term, decided March 30, 1942.[15] More-

[14] The delay is attributable, in part, to the fact that after petitioner had filed exceptions to the examiner's intermediate report based upon the evidence taken at the original hearing, petitioner filed two applications for leave to take additional evidence, which the Board granted. The Board's decision issued less than 4 months after the close of the final hearing (R. 84–85).

[15] See, also, *National Labor Relations Board* v. *Isthmian Steamship Co.*, 126 F. (2d) 598 (C. C. A. 2); *National Labor Relations Board* v. *Wilson Line, Inc.*, 122 F. (2d) 809 (C. C. A. 3); *Triplex Screw Co.* v. *National Labor Relations*

over, the defense of laches is not available in a proceeding brought by an agency of the federal government. *Chesapeake & Delaware Canal Co.* v. *United States,* 250 U. S. 123; *Board of Commissioners* v. *United States,* 308 U. S. 343.

8. The provisions in the order which require the petitioner to post notices that it will not engage in conduct from which it has been ordered to cease and desist are in the form usually used by the Board. Similar provisions have been approved by this Court (*National Labor Relations Board* v. *Express Publishing Co.,* 312 U. S. 426, 438–439), and have uniformly been enforced by this Court and the circuit courts of appeals.[16]

Board, 117 F. (2d) 858 (C. C. A. 6); *National Labor Relations Board* v. *Superior Tanning Co.*, 117 F. (2d) 881 (C. C. A. 7), certiorari denied, 313 U. S. 559; *National Labor Relations Board* v. *Aluminum Products Co.*, 120 F. (2d) 567 (C. C. A. 7); *National Labor Relations Board* v. *Bachelder*, 120 F. (2d) 574 (C. C. A. 7), certiorari denied, 314 U. S. 647. The case of *National Labor Relations Board* v. *Mall Tool Co.*, 119 F. (2d) 700 (C. C. A. 7), cited by petitioner (Pet. 15), involved a wholly different situation, i. e., unexcused delay on the part of discharged employees in filing charges with the Board.

[16] *National Labor Relations Board* v. *A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4), and *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678 (C. C. A. 6), cited by petitioner (Pet. 15–16), dealt with a different form of notice which the Board no longer uses.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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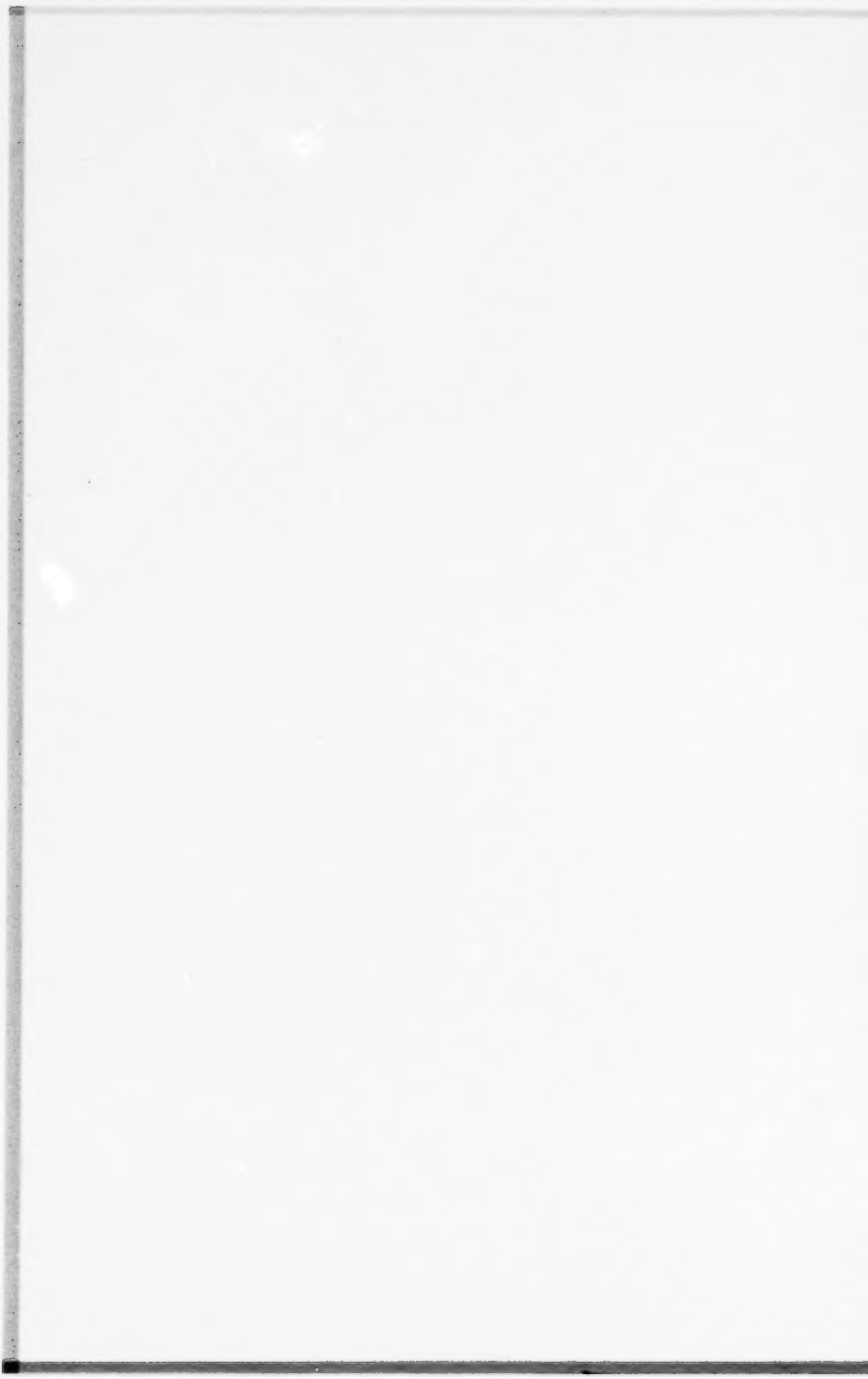

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

U. S. GOVERNMENT PRINTING OFFICE: 1943